

Article

Which Law Governs During Armed Conflict? The Relationship Between International Humanitarian Law and Human Rights Law

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INTRODUCTION

On May 31, 2010, in the early hours of the morning, Israeli Defense Forces boarded and occupied a flotilla of six vessels seventy-two nautical miles from the coast of Gaza. The flotilla carried food and other supplies to Gaza, which was under a naval blockade. During the incident, nine passengers were killed and several others wounded. In the aftermath, a key question that emerged was what body of law applied to the incident? Was it subject to human rights law, international humanitarian law, or some mix of the two?¹

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1. SECRETARY-GENERAL'S PANEL OF INQUIRY ON THE 31 MAY 2010 FLOTILLA INCIDENT, REPORT OF THE SECRETARY-GENERAL'S PANEL OF INQUIRY ON THE 31 MAY 2010 FLOTILLA INCIDENT, at 97 (July 2011), http://www.un.org/News/dh/infocus/middle_east/Gaza_Flotilla_Panel_Report.pdf (noting, in discussing the issue, that "[t]here has been considerable legal debate on the precise nature of the relationship between these two legal regimes," and that "[p]ositions taken in academic writing range from complete separation to complementarity and even fusion"). Hereinafter, this Article uses the term "humanitarian law" to refer to what is often termed "international humanitarian

This same question has been at the heart of ongoing debates over the counter-terrorism operations of the United States in the wake of September 11, 2001. There was relatively little discussion of the relationship between human rights law and humanitarian law in the U.S. government before the terrorist attacks on September 11, 2001, because the issue did not often arise. On those few occasions that it did arise, the government's position was far from consistent. In 1970, the U.S. government supported U.N. General Assembly resolutions calling for compliance with human rights obligations during armed conflicts.² In 1984, however, the United States made clear its view that the Convention Against Torture—a core human rights treaty—was inapplicable during armed conflict.³ The United States appeared to switch positions yet again when it adopted the International Covenant on Civil and Political Rights in 1992 without adding a similar disclaimer.⁴

law” or “the law of armed conflict”—the law that regulates the conduct of armed conflicts found in the 1949 Geneva Conventions and related protocols, treaties, case law, and customary international law.

2. In 1970, the General Assembly adopted five resolutions on the subject of human rights in armed conflict, including one co-sponsored by the United States on the humane treatment of prisoners of war, urging “strict compliance with the provisions of existing international instruments concerning human rights in armed conflicts.” G.A. Res. 2676 (XXV), U.N. GAOR, 25th Sess., U.N. Doc. A/RES/2676, at 77 (Dec. 9, 1970); see also Airgram from the Department of State to Certain Posts (Aug. 12, 1971), in 5 FOREIGN RELATIONS OF THE UNITED STATES, 1969–1972, at 177, 187 (Evan M. Duncan, ed., 2004). Another unanimous resolution (not including eight abstentions) issued the same day stated: “Fundamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflict.” G.A. Res. 2675 (XXV), U.N. GAOR, 25th Sess., U.N. Doc. A/RES/2675, at 76 (Dec. 9, 1970) (voting record available at <http://www.un.org/en/ga/documents/voting.asp>).

3. Rep. of the Working Grp. on a Draft Convention Against Torture & Other Cruel, Inhuman or Degrading Treatment or Punishment, Comm’n on Human Rights, 40th Sess., ¶ 5, U.N. Doc. E/CN.4/1984/72 (Mar. 9, 1984) (arguing that “the convention . . . was never intended to apply to armed conflicts and thus supersede the 1949 Geneva Conventions on humanitarian law in armed conflicts and the 1977 Protocols additional thereto”).

4. The decision was all the more striking because the Human Rights Committee had made clear its view that the Convention was applicable during armed conflict. See Françoise J. Hampson, *The Relationship Between International Humanitarian Law and Human Rights Law from the Perspective of a Human Rights Treaty Body*, 90 INT’L REV. RED CROSS 549, 550 n.5 (2008). It is of course possible that the United States regarded a reservation as unnecessary because it did not believe the International Covenant on Civil and Political Rights would apply extraterritorially. But it is also possible to interpret the decision to suggest U.S. acceptance of the idea that some human rights norms applied during times of armed conflict.

After the devastating terrorist attacks on September 11, 2001, the question became much more pressing. The ongoing wars in Afghanistan and Iraq, and extensive detainee operations, have turned questions that were once a hypothetical possibility into real legal dilemmas.⁵ In 2010, U.S. Department of State Legal Adviser Harold Koh appeared before the American Society of International Law to reaffirm that all relevant laws of war apply even to detainees earlier deemed “enemy combatant[s].”⁶ He emphasized that, “as a matter of international law, this Administration has expressly acknowledged that international law informs the scope of our detention authority.”⁷ He also argued that targeting decisions comply with “all applicable law, including the laws of war.”⁸ Yet Koh left unaddressed a

5. State Department Legal Adviser John Bellinger faced these issues in his appearance before the Committee Against Torture in 2006. John B. Bellinger, III, Legal Adviser, U.S. Dep’t of State, Opening Remarks at U.S. Meeting with U.N. Committee Against Torture (May 5, 2006), *available at* <http://www.state.gov/g/drl/rls/68557.htm>; *see* Memorandum from the Government of the United States of America (Mar. 10, 2006) *available at* <http://www.asil.org/pdfs/ilib0603212.pdf> (reply to the Report of the Five UNCHR Special Rapporteurs on Detainees in Guantanamo Bay); *see also* Memorandum from the U.S. Dep’t of State to the U.N. Committee Against Torture (Apr. 28, 2006), *available at* <http://www.state.gov/documents/organization/68662.pdf> (response to questions asked by the committee against torture). Bellinger explained that “[i]t is the view of the United States that these detention operations are governed by the law of armed conflict, which is the *lex specialis* applicable to those operations.” Bellinger, *supra*. The current legal adviser has also addressed these issues. Harold Hongju Koh, Legal Adviser, U.S. Dep’t of State, Address at the Annual Meeting of the American Society of Int’l Law (Mar. 25, 2010), *available at* <http://www.state.gov/s/l/releases/remarks/139119.htm> (“[W]e continue to fight a war of self-defense against an enemy that attacked us on September 11, 2001, and before, and that continues to undertake armed attacks against the United States.”).

6. Koh, *supra* note 5 (“Let there be no doubt: the Obama Administration is firmly committed to complying with all applicable law, including the laws of war, in all aspects of these ongoing armed conflicts We in the Obama Administration have worked hard since we entered office to ensure that we conduct all aspects of these armed conflicts—in particular, detention operations, targeting, and prosecution of terrorist suspects—in a manner consistent not just with the applicable laws of war, but also with the Constitution and laws of the United States.”); *see also* Respondents’ Memorandum Regarding the Gov’t’s Detention Auth. Relative to Detainees Held at Guantanamo Bay at 1, *In re Guantanamo Bay Detainee Litig.*, 581 F. Supp. 2d 33 (D.D.C. 2008) (No. 08-442) (“The detention authority conferred by the AUMF is necessarily informed by principles of the laws of war.”).

7. Koh, *supra* note 5.

8. *Id.*; *see also* Respondents’ Memorandum Regarding the Government’s Detention Auth. Relative to Detainees Held at Guantanamo Bay, *supra* note 6 (“The detention authority conferred by the AUMF is necessarily informed by principles of the laws of war.”).

key legal question: Which law governs during armed conflict—human rights law or humanitarian law?

This Article aims to answer that question. It considers the relationship between human rights law and humanitarian law in the context of armed conflict and occupation. It draws on jurisprudence, state practice, and recent scholarship to describe three central approaches to applying the two bodies of law, to offer a recommendation as to which of the approaches provides the best guide to reconciling conflicts between the two bodies of law, and to explain the stakes of that choice.

This Article proceeds in four parts. Part I addresses a threshold question: under what conditions does each body of law *potentially* apply? This Part outlines methods for determining when an armed conflict or occupation situation exists, since armed conflict and occupation activate humanitarian law.⁹ It then examines territorial sovereignty and the emerging effective-control standard for the extraterritorial application of human rights as prerequisites for the application of human rights law.

Part II identifies three theoretical approaches to the relationship between the two bodies of law. First is the *Displacement Model*. The Displacement Model has the virtue of simplicity: During an armed conflict, humanitarian law displaces human rights law. When no armed conflict exists, human rights law displaces humanitarian law. Second is the *Complementarity Model*. Complementarity is relatively simple in theory, though substantially more complicated in practice. In the Complementarity Model, as in all the models, when there is no armed conflict, only human rights law applies. When there is an armed conflict, however, human rights law and humanitarian law are applied and interpreted harmoniously. The two bodies of law thus have what this Article terms a “relationship of interpretation.” Third is the *Conflict Resolution Model*. In the Conflict Resolution Model, when an armed conflict is present, the decision maker must evaluate the relationship between human rights law and humanitarian law. If they are, in fact, complementary, then both are applied. If they conflict, however, the model offers three possible decision rules—event-specific displacement, reverse event-specific displacement, and specificity—for deciding the appropriate body of law to be applied.

9. For the sake of simplicity, most of this Article refers only to “armed conflict,” though the legal analysis applies to both armed conflict and occupation.

Part II concludes with a detailed discussion of the specificity-decision rule variation of the Conflict Resolution Model. Under this decision rule, in situations of conflict between relevant human rights law and humanitarian law, the law more specific to the particular situation should govern. This Part also describes a number of factors that aid in determining which body of law is more specific to a given situation. The specificity rule of conflict resolution that we detail derives from the broader *lex specialis maxim*, which states that “whenever two or more norms deal with the same subject matter, priority should be given to the norm that is more specific.”¹⁰ However, the specificity rule applies at the level of the *operation*, *situation*, or *encounter*, so that whichever body of law is eclipsed *in that operation*, *situation*, or *encounter* still remains relevant in the broader armed conflict.

Part III argues for the specificity rule variation of the Conflict Resolution Model—and shows how that rule would operate. This rule offers a legally and morally defensible approach to the question of which law governs during armed conflict. It recognizes that both bodies of law can productively inform each other when they do not squarely conflict, yet allows for highly nuanced determinations as to when conduct is governed best by each body of law when conflict is unavoidable. Above all, the approach recognizes that total abrogation of human rights law in a zone of armed conflict is too blunt an instrument to accomplish the most basic goal common to both human rights law and humanitarian law: to effectively protect fundamental human dignity.

Part IV applies the theoretical discussion of Parts II and III to examples of conduct governed by both bodies of law. It examines situations in which conflicts actually exist between the two and considers how they might be approached. Square conflicts between the two bodies of law can be found in situations of armed conflict when human rights law regarding the right to life; detention and the right to trial; women’s rights; and the rights to freedom of expression, association, and movement is implicated. To take just the right to life, humanitarian law permits state agents to intentionally kill combatants and incidentally kill civilians (within clearly proscribed limits) in circumstances that human rights law does not countenance. At bottom, therefore, human rights law and humanitarian law

10. Rep. of the Int’l Law Comm’n, 58th Sess., May 1–June 9, July 3–Aug. 11, 2006, at 408, U.N. Doc. A/61/10 (2006).

give fundamentally different answers to the question of when state agents can use lethal force. The same is true of each of these conflicts between the two bodies of law, thus making plain the high stakes of the answer to the question of which law governs—and the pressing need to address it.

Finally, this Article concludes with a call to a renewed and robust debate over which law governs during armed conflict. This issue is more pressing today than ever before. Human rights jurisprudence is placing greater obligations on states acting outside their own territory, and modern warfare is rarely limited to the traditional “battlefield.” Conflict between humanitarian law and human rights law is therefore inevitable, and finding a way to resolve this conflict is essential to the continued vitality of both bodies of law.

I. WHEN DOES EACH BODY OF LAW APPLY?

Before we examine the relationship between human rights law and humanitarian law, we first must ask when each body of law applies to a given situation. After all, choosing between the two bodies of law requires that either body of law could potentially apply. Yet each body of law has rules governing whether it is applicable to a given situation—rules that are completely independent of any conflict between them. This Part offers an overview of when each body of law applies. This provides the necessary background for the next Part, which considers the options for resolving conflicts that arise between the two bodies of law when both might apply to a given situation.

A. WHEN DOES INTERNATIONAL HUMANITARIAN LAW APPLY?

Humanitarian law applies only in situations of armed conflict; hence the applicability of this body of law turns on whether an armed conflict or occupation exists. The fundamental question of when an armed conflict or occupation exists may appear on its face quite simple and obvious, but in reality is extraordinarily complex. Here we sketch the key legal principles that are generally used to answer this question.

We begin briefly with how to identify the existence of an “occupation.” Article 42 of the 1907 Hague Convention provides: “Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been es-

established and can be exercised.”¹¹ Article 43 similarly speaks of the “authority of the legitimate power having in fact passed into the hands of the occupant”¹² In addition, Common Article 2 of the Geneva Conventions provides that the Conventions “shall apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.”¹³ It is clear that an occupation ends when the occupying power withdraws its forces from the territory in question. There is some controversy over whether an occupation ends when the government of the territory formally consents to the continued presence of foreign troops or whether some level of effective authority must be transferred as well.¹⁴

Identifying the existence of an armed conflict is markedly more challenging—and has become more so in recent years with the decreasing frequency of traditional “battlefield” conflicts and the proliferation of non-state armed actors with a cross-national presence, like al-Qaeda. Among the most comprehensive recent efforts to define armed conflict is the International Law Association’s Final Report on the Meaning of Armed Conflict in International Law.¹⁵ After the initiation of the “war on terror,” the Executive Committee of the International Law Association “was asked to . . . report on how international law defines and distinguishes situations of armed conflict and those situations in which peacetime law prevails.”¹⁶ The Committee found that, today:

Declarations of war or armed conflict, national legislation, expressions of subjective intent by parties to a conflict, and the like, may have evidentiary value but such expressions do not alone create a *de jure* state of war or armed conflict The *de jure* state or situation

11. Convention Respecting the Laws and Customs of War on Land, art. 42, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631.

12. *Id.* art. 43.

13. Geneva Convention Relative to the Treatment of Prisoners of War, art. 2, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III].

14. See Siobhán Wills, *The Obligations Due to Former “Protected Persons” in Conflicts that Have Ceased to Be International*, 15 J. CONFLICT & SECURITY L. 117, 131–33 (2010) (describing contemporary debates over the meaning of occupation under international law).

15. INT’L LAW ASS’N, FINAL REPORT ON THE MEANING OF ARMED CONFLICT IN INTERNATIONAL LAW (2010), available at <http://www.ila-hq.org/en/committees/index.cfm/cid/1022>.

16. *Id.* at 1.

of armed conflict depends on the presence of actual and observable facts, in other words, objective criteria.¹⁷

While "the Committee found no widely accepted definition of armed conflict in any treaty, . . . [i]t did . . . discover significant evidence in the sources of international law that the international community embraces a common understanding of armed conflict."¹⁸ The two characteristics the Committee identified as common to all armed conflict were, first, "[t]he existence of organized armed groups" and, second, that the groups are "[e]ngaged in fighting of some intensity."¹⁹

The Committee report drew on, among a diverse array of other sources, the frequently cited 1995 decision of the International Criminal Tribunal for the former Yugoslavia in *Prosecutor v. Tadić*, which also pointed to two factors—organization of armed groups and intensity of fighting—as the defining characteristics of armed conflict.²⁰ Of course, what constitutes a sufficiently organized armed group and what counts as sufficient intensity of fighting are issues not fully settled by this case or any other single source.

Even when it is clear that an armed conflict exists, there is often a further question of whether the conflict is an international armed conflict (IAC) or a noninternational armed conflict (NIAC). Identifying the type of armed conflict is an important step in selecting the international humanitarian instruments

17. *Id.* at 33. Common Article 2 of the Geneva Conventions similarly provides that "the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise . . ." GC III, *supra* note 13, art. 2.

18. INT'L LAW ASS'N, *supra* note 15, at 1.

19. *Id.* at 2. It should be noted that the ICRC commentary on Common Article 2 can be read to adopt a lower threshold for the existence of an armed conflict:

Any difference arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2 It makes no difference how long the conflict lasts, or how much slaughter takes place. The respect due to human personality is not measured by the number of victims. Nor, incidentally, does the application of the Convention necessarily involve the intervention of cumbersome machinery. It all depends on circumstances. If there is only a single wounded person as a result of the conflict, the Convention will have been applied as soon as he has been collected and tended

1 INT'L COMM. OF THE RED CROSS, COMMENTARY: GENEVA CONVENTIONS OF 12 AUGUST 1949, at 32 (Jean S. Pictet ed., 1952). The ICRC commentaries on the other Geneva Conventions contain similar language.

20. *Prosecutor v. Tadić*, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995), available at <http://www.ijl.org/courses/documents/Prosecutorv.Tadic.pdf>.

and customary rules that apply.²¹ Recently, particularly in the “war on terror” context, the line between international and non-international armed conflict has blurred, and there have been calls for a new common definition of armed conflict.²² Until that happens, the factors outlined by the International Law Association and in the *Tadić* case will continue to provide the best available guidance on the question of when an armed conflict exists and therefore when humanitarian law applies.

B. WHEN DOES HUMAN RIGHTS LAW APPLY?

Compared to humanitarian law, human rights law is more varied and stems from more diverse legal sources. There are over one hundred different human rights treaties as well as multiple customary international human rights norms that govern state action.²³ Human rights law addresses a wide range of behavior and actions, including torture, genocide, women’s rights, children’s rights, racial discrimination, and the right to life, to name just a few.²⁴

The immense variation in human rights law makes it difficult to provide a blanket characterization of its applicability. For those areas of human rights law where there is a treaty that is the key source of the legal rules governing state conduct, the application of those rules is generally guided by that treaty and authoritative interpretations of it. In these cases, the application of human rights law may be expressly limited by the treaty itself—for example, it may be explicitly limited to the geographic territory of the ratifying States or to particular types of perpetrators. For those areas of human rights that derive from more diffuse sources or that have attained customary

21. Compare Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict, arts. 51(3), 41, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I], with Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, art. 6(2), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP II]. See generally ICRC, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 3–24 (Jean-Marie Henckaerts & Louise Dorwald-Beck eds., 2005) (explaining the different rules of customary international humanitarian law in international and noninternational armed conflicts).

22. See James G. Stewart, *Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict*, 85 INT’L REV. RED CROSS 313, 344–49 (2003).

23. See Oona A. Hathaway, *Do Human Rights Treaties Make A Difference?*, 111 YALE L.J. 1935, 1937–41 (2002).

24. See *id.* at 1963–75.

international law or *jus cogens* status, on the other hand, the law may have comprehensive application.

There are, nonetheless, a few observations about the applicability of human rights law that are possible as a general matter. Human rights law almost always applies at a minimum within the territorial boundaries of the States that have ratified the relevant human rights treaties. This obligation has long been widely accepted.²⁵

As States have increasingly found themselves operating outside their own territorial boundaries—including in the context of armed conflict and the “war on terror”—the question has more frequently arisen whether human rights obligations apply extraterritorially, particularly with respect to non-citizens. In the past, representatives of the United States have taken the position that such obligations—including those under the International Covenant on Civil and Political Rights (ICCPR) and the Convention Against Torture—do not apply extraterritorially.²⁶

25. International Covenant on Civil and Political Rights, art. 2(1), Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR] (obligating members “to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant”); Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), *available at* http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf (“[E]very individual and every organ of society . . . shall strive . . . to promote respect for these rights and freedoms . . . both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.”).

26. *See, e.g.*, Bellinger, *supra* note 5 (“As a general matter, countries negotiating the Convention [Against Torture] were principally focused on dealing with rights to be afforded to people through the operation of ordinary domestic legal processes”); Letter from Kevin Moley, Permanent Representative of the U.S. to the U.N. & Other Int’l Orgs. in Geneva, to the Office of the High Comm’r for Human Rights (Jan. 31, 2006), *reprinted as* U.N. High Comm’n on Human Rights, Rep. of the Chairperson-Rapporteur of the Working Group on Arbitrary Detention et al. on the Situation of Detainees at Guantanamo Bay, Annex II, E/CN.4/2006/120 (Feb. 27, 2006) (“The United States has made clear its position that . . . the International Covenant on Civil and Political Rights, by its express terms, applies only to ‘individuals within its territory and subject to its jurisdiction’ [and not, e.g., to detainees outside the territorial U.S.].”), *available at* http://www.essex.ac.uk/human_rights_centre/research/rth/docs/GBAY.pdf. The United States’s fourth periodic report required under the ICCPR did not reject or accept the extraterritorial application of the Convention; it was, instead, silent on the matter. *See* U.S. DEP’T OF STATE, FOURTH PERIODIC REPORT OF THE U.S. TO THE UNITED NATIONS COMMITTEE ON HUMAN RIGHTS CONCERNING THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (Dec. 30, 2011), *available at* <http://www.state.gov/j/drl/rls/179781.htm>. In light of the Committee’s position that the Convention does have extraterritorial effect, this silence might be seen as a move toward acceptance of extraterritorial effect. Nonetheless, it is premature to know with

Today there is growing consensus among international bodies and foreign States that human rights law obligations apply abroad wherever a State exercises “effective control” over territory or individuals outside its borders.²⁷ This standard has been articulated slightly differently by different bodies, including the Inter-American Commission on Human Rights, the U.N. Human Rights Committee, the Committee Against Torture, the International Court of Justice (ICJ), and the European Court of Human Rights, as well as various national courts.²⁸ Although the specific legal formulations are different, the basic message is similar across all of these regimes: control, rather than territorial sovereignty, defines the outer limits of human rights law obligations.²⁹ That principle, which is gaining growing acceptance in the international arena, may suggest much broader applicability for at least some human rights law than has been traditionally assumed—particularly in the United States. That, in turn, will give rise to increasing conflict between humanitarian law and human rights law during armed conflict. We turn next to exploring three different models for resolving this conflict between the two bodies of law.

II. THREE MODELS FOR RESOLVING THE CONFLICT

There have been many efforts to make sense of the relationship between humanitarian law and human rights law. Here we categorize these efforts into three distinct models for

certainty if this apparent softening on the part of the United States will have any legal consequences.

27. See Sarah H. Cleveland, *Embedded International Law and the Constitution Abroad*, 110 COLUM. L. REV. 225, 229 (2010) (“Regional human rights tribunals, the U.N. treaty bodies, and the International Court of Justice (ICJ) all have recognized that human rights obligations travel with a state when a state or its agents place persons or territories under the state’s ‘effective control.’”); Oona A. Hathaway, et al., *Human Rights Abroad: When Do Human Rights Treaty Obligations Apply Extraterritorially?*, 43 ARIZ. ST. L.J. 389, 395–420 (2010) (examining international and foreign case law regarding the extension of human rights obligations outside a state’s borders).

28. See Cleveland, *supra* note 27, at 248–70; Hathaway et al., *supra* note 27, at 404–20.

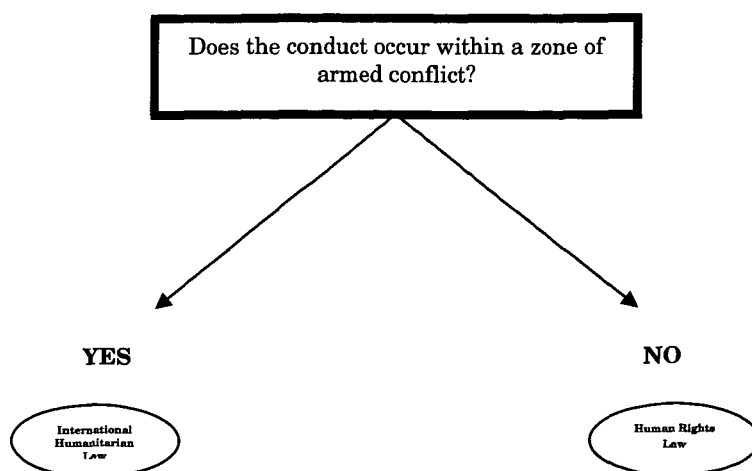
29. See Cleveland, *supra* note 27, at 269 (“Whether one employs the ‘authority and control’ test of the Inter-American system, the ‘power of effective control’ standard of the Human Rights Committee and the International Court of Justice, the ‘de facto and de jure effective control’ of the Committee Against Torture—all of which apply to control over either persons or territories . . . or the more territorially-constrained conception of ‘control’ of the ECHR, *control*, rather than geography, is the touchstone for the recognition of rights protections abroad.”) (emphasis in original)).

resolving conflicts between the two bodies of law in situations of armed conflict: the Displacement Model, the Complementarity Model, and the Conflict Resolution Model. The models discussed herein are not formal rules of decision that different courts and governments have expressly adopted. Rather, they represent an attempt to classify the diverse approaches that tribunals, States, practitioners, and scholars have used or advocated into three analytically distinct categories. This effort to classify existing approaches must be tempered by a recognition that cases in the real world do not always fit neatly within a single model. For that reason, this discussion also notes cases that include language that might be read to support more than one model or that might be read differently in light of the different models.

A. THE DISPLACEMENT MODEL

The Displacement Model provides that whenever there is an armed conflict, humanitarian law displaces human rights law. Defining the zone of armed conflict is thus the first and last step for determining the appropriate body of law in the Displacement Model. If the conduct occurs within the zone of armed conflict, humanitarian law governs exclusively and displaces any human rights law that might otherwise apply. If the conduct is outside that zone, human rights law remains operative. Displacement models may vary in their definition of armed conflict, making the field for application of humanitarian law larger or smaller, but the basic tradeoff remains the same. Figure 1 illustrates the decision-making process under the Displacement Model.

Figure 1
Displacement Model



This approach is labeled “displacement” because humanitarian law is understood to *displace* human rights law entirely during armed conflict.³⁰ The premise underlying this approach is that countries developed humanitarian law to replace the norms controlling peacetime behavior, due to the demands of military necessity and the limitations of control during armed conflict.³¹ In this model, *lex specialis* is determined at the level of the armed conflict—humanitarian law is the *lex specialis* for all conduct within the entire zone of an armed conflict. In this respect it differs markedly from the “event-specific displacement” rule of decision (discussed in Part III.C.1 below), which similarly operates to displace human rights law, but on the much smaller scale of a single event, operation, or situation.

Proponents of the displacement approach rely on an aggressive reading of the ICJ’s *Nuclear Weapons* advisory opinion.³² The ICJ wrote:

In principle, the right not arbitrarily to be deprived of one’s life [codified in Article 6 of the ICCPR] applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the [ICCPR], can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the [ICCPR] itself.³³

The Displacement Model emphasizes the qualifying “in principle” of the first sentence of this quote and the definitive “only” of the final sentence.³⁴ In other words, it concludes that during hostilities, the only law relevant to determining whether a par-

30. Memorandum from Tom Dannenbaum, *The Interaction of International Human Rights Law and International Humanitarian Law with Respect to Rights to Life and Liberty*, as part of the Allard K. Lowenstein International Human Rights Clinic 7 (Dec. 17, 2009) (on file with authors) [hereinafter Dannenbaum Memo].

31. *Id.* at 11; see Cordula Droege, *The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict*, 40 ISR. L. REV. 310, 347 (2007). But see David Kretzmer, *Rethinking Application of IHL in Non-International Armed Conflicts*, 42 ISR. L. REV. 1, 23–31 (2009) (arguing that, with the advent of the modern human rights regime, humanitarian law is anachronistic and unnecessary except in situations of extreme violence).

32. See Dannenbaum Memo, *supra* note 30, at 5–6.

33. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 25 (July 8), available at <http://www.icj-cij.org/docket/files/95/7495.pdf>.

34. See Dannenbaum Memo, *supra* note 30, at 12.

ticular loss of life constitutes an “arbitrary deprivation of life” is the law of armed conflict.³⁵

The United States government has at times articulated arguments that could be read to reflect the Displacement Model, downplaying the role of human rights law in armed conflict—particularly in the “global war on terror” context.³⁶ The Israeli Government has also at times advocated the displacement approach, specifically by denying the applicability of human rights law to the Occupied Territories:

Israel denies that the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, both of which it has signed, are applicable to the occupied Palestinian territory. It asserts that humanitarian law is the protection granted in a conflict situation such as the one in the West Bank and Gaza Strip, whereas human rights treaties were intended for the protection of citizens from their own Government in times of peace.³⁷

It takes this position not only because it rejects the extraterritorial application of human rights law,³⁸ but also because it characterizes the situation in the Occupied Territories as one of ongoing armed conflict.³⁹

Aside from the U.S. and Israeli governments, there are few express adherents to the Displacement Model in the interna-

35. *See id.*

36. *See* Bellinger, *supra* note 5 (“It is the view of the United States that . . . detention operations [in Guantánamo, Afghanistan, and Iraq] are governed by the law of armed conflict, which is the *lex specialis* applicable to those operations.”); Memorandum from the Government of the United States of America, *supra* note 5.; Memorandum from the U.S. Dep’t of State to the U.N. Committee Against Torture, *supra* note 5; *see also* Nancie Prud’homme, *Lex Specialis: Oversimplifying a More Complex and Multifaceted Relationship?*, 40 *ISR. L. REV.* 356, 358 (2007).

37. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 102 (July 9).

38. *See* U.N. Human Rights Comm., *Second Periodic Rep. of Israel to the Human Rights Comm.*, ¶ 8, U.N. Doc. CCPR/C/ISR/2001/2 (Dec. 4, 2001) [hereinafter *Second Periodic Report*], available at <http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/2cc0a33c394919e0c1256be9002e1188?Opendocument>; *see also* Cordula Droegge, *Elective Affinities? Human Rights and Humanitarian Law*, 90 *INT’L REV. RED CROSS* 501, 519 (2008) (describing Israel as having “consistently objected to the extraterritorial application of human rights instruments”). *But see* HCJ 3239/02 Marab v. IDF Commander in the West Bank 57 (2) PD 349 [2002] (Isr.). For a discussion of the extraterritorial application of human rights law, *see supra* Part II.B.

39. *See* Prud’homme, *supra* note 36, at 376 (stating that Israel has “reject[ed] the application of a number of human rights treaties in the Occupied Territories on the basis that this situation was one pertaining to armed conflict”).

tional community. The bluntness of the approach, which denies any role for human rights law during the course of an armed conflict, has been regarded by most as inconsistent with a serious commitment to human rights law.⁴⁰ The bluntness of the model also prevents conflicts from being heard by legal bodies with the greatest subject-matter expertise. If human rights law is completely displaced and therefore inapplicable in the course of armed conflict, then the human rights bodies that are charged with overseeing States' implementation of their human rights obligations have no obligations to oversee. If a child is a victim of violence during an armed conflict, for example, the Displacement Model or event-specific displacement might prevent the international organization with the greatest expertise in children's rights—the Committee for the Rights of the Child—from considering the violation. For if the Convention on the Rights of the Child is completely displaced by humanitarian law during armed conflict, there are no longer any treaty-based "obligations" for the Committee to oversee.

The Displacement Model does, however, have the virtue of simplicity. The other two models allow both bodies of law to apply within the zone of armed conflict at various points. But this raises the difficult question of *when* each body of law should be applied to a given situation and how to resolve conflict between the two. The other two models—Complementarity and Conflict Resolution—offer two different answers to this question.

B. THE COMPLEMENTARITY MODEL

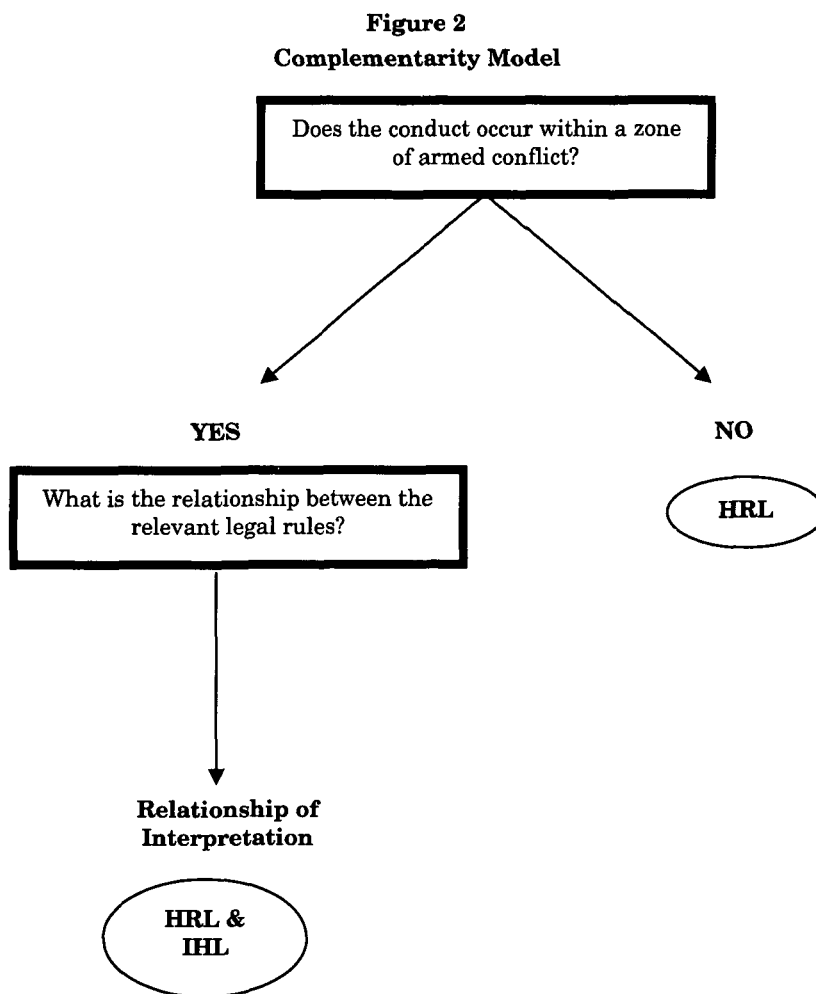
The Complementarity Model provides that both bodies of law are applied and interpreted in concert with one another. Sometimes called the "mutual elaboration" or "coordinated interpretation" approach,⁴¹ the model is grounded in the principle that the two bodies of law are engaged in a common mission to protect human life and dignity.⁴² It avoids the key weakness of the displacement approach, because it provides that human rights law can continue to offer guidance even when armed con-

40. See, e.g., INT'L LAW ASS'N, *supra* note 15, at 3.

41. Dannenbaum Memo, *supra* note 30, at 8.

42. See Jakob Kellenberger, President, Int'l Comm. of the Red Cross (ICRC), Address at the 27th Annual Round Table on Current Problems of International Humanitarian Law (Sept. 6, 2003), available at <http://www.icrc.org/web/eng/siteeng0.nsf/html/5rfgaz> ("The common underlying purpose of international humanitarian law and international human rights law is the protection of the life, health and dignity of human beings.").

flict is triggered. Because it assumes the two bodies of law share a common foundational mission, it views them not as lying in conflict but instead as complementary. The approach is illustrated in Figure 2.



The Complementarity Model assumes that, in any instance where both bodies of law apply, the laws can be interpreted in such a way that they do not conflict—that is, the laws exhibit a “relationship of interpretation.” Thus, the only operative question is whether there is an armed conflict (and thus whether humanitarian law applies). If so, then that law is applied in

conjunction with human rights law. If not, then only human rights law applies.

The Complementarity Model relies on the authority of Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT), which requires treaty parties interpreting their obligations to take into account “[a]ny relevant rules of international law applicable in the relations between the parties.”⁴³ As such, humanitarian law provides rules relevant to the interpretation of human rights law in times of armed conflict, while human rights law can do the same for humanitarian law.⁴⁴

The Complementarity Model suggests a different reading of the ICJ’s *Nuclear Weapons* advisory opinion than that offered by advocates of the Displacement Model described in Part II.A.⁴⁵ In language that immediately precedes that quoted above, the ICJ expressly states that the ICCPR applies in hostilities:

[T]he protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision.⁴⁶

Advocates of the Complementarity Model hold the language to which the Displacement Model points, then, is better read not as calling for displacing human rights law in favor of humanitarian law but as using humanitarian law to *inform the interpretation* of human rights law—in this case, the meaning of an “arbitrary deprivation of life.”⁴⁷

The ICJ’s *Wall* advisory opinion supports this reading of the *Nuclear Weapons* opinion. The court explains that in the *Nuclear Weapons* opinion, it had “rejected” the argument that “the Covenant was directed to the protection of human rights in peacetime, but that questions relating to unlawful loss of life in hostilities were governed by the law applicable in armed con-

43. Vienna Convention on the Law of Treaties, art. 31, May 23, 1969, 1155 U.N.T.S. 331.

44. Dannenbaum Memo, *supra* note 30, at 8.

45. See *supra* notes 32–34 and accompanying text.

46. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 25 (July 8); see also Vera Gowlland-Debbas, *The Relevance of Paragraph 25 of the ICJ’s Advisory Opinion on Nuclear Weapons*, 98 AM. SOC’Y INT’L L. PROC. 358, 359 (2004) (arguing that paragraph 25 of the *Nuclear Weapons* opinion “serves to reinforce the consistent trend in human rights case law that the individual is entitled to both human rights and humanitarian law protection in complementary fashion in time of armed conflict”).

47. *Nuclear Weapons*, 1996 I.C.J. ¶ 25.

flict.”⁴⁸ It states, “the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation.”⁴⁹ Instead, “the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.”⁵⁰

The Complementarity Model is also reflected in General Comments by the U.N. Human Rights Committee.⁵¹ The Committee stated the proposition directly in General Comment 31: “While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.”⁵²

The International Committee of the Red Cross (ICRC) has also been a leading advocate of this approach.⁵³ Speaking before the 27th Annual Round Table on Current Problems of International Humanitarian Law, Jakob Kellenberger, President of the ICRC, took the position that the bodies of law are “distinct but complementary.”⁵⁴ Although acknowledging differences in the law—for example, that some human rights law requirements are derogable while humanitarian law is always nonderogable—he maintained that these differences did not render the bodies of law “mutually exclusive.”⁵⁵

The recent jurisprudence of the Inter-American Court of Human Rights and the Inter-American Commission of Human Rights is also most consistent with the Complementarity Model. *Bámaca Velásquez* represents the high-water mark of the

48. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 105 (July 9) (quotation omitted). See Case Concerning Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 168, ¶¶ 216–20 (Dec. 19); *Construction of a Wall*, 2004 I.C.J. ¶¶ 102–13.

49. *Construction of a Wall*, 2004 I.C.J. ¶ 106.

50. *Id.*

51. Dannenbaum Memo, *supra* note 30, at 8–9. See generally Human Rights Comm., General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004); Human Rights Comm., General Comment No. 29: States of Emergency (Article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001).

52. General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, *supra* note 51, ¶ 11.

53. See Kellenberger, *supra* note 42.

54. *Id.*

55. *Id.*

Inter-American Court's application of the model.⁵⁶ The Inter-American Court explained: "the relevant provisions of the Geneva Convention may be taken into consideration as elements for the interpretation of the American Convention."⁵⁷ Hence, the American Convention—a human rights agreement—remained fully operative and compatible with humanitarian law during armed conflict.

In *Coard v. United States*, the Inter-American Commission was more restrained. It held that "while international humanitarian law pertains primarily in times of war and the international law of human rights applies most fully in times of peace, the potential application of one does not necessarily exclude or displace the other."⁵⁸ The Commission then went on to note that humanitarian law could help to define whether detention was "arbitrary" under the terms of Articles I and XXV of the American Declaration.⁵⁹

The qualifying adverb "necessarily" illustrates a key weaknesses of the Complementarity Model: it is grounded in the assumption that conflicts between the two systems of law are always reconcilable through complementary interpretation.⁶⁰ As described in greater detail in Part IV, however, there are some circumstances in which it is not possible to reconcile conflicts between the two bodies of law in this way. One example is the treatment of persons captured during armed conflict: humanitarian law specifies that "combatants" be held as POWs until the end of hostilities (and then returned), while human rights law specifies that detainees be tried for their offenses and detained only if convicted and then only for the period of the sentence.⁶¹ Clearly, humanitarian law envisions uniform-wearing

56. *Bámaca-Velásquez v. Guatemala*, Merits, Inter-Am. Ct. H.R. (ser. C) No. 70 (Nov. 25, 2000), available at http://www.corteidh.or.cr/docs/casos/articulos/Seriec_70_ing.pdf; see also *Las Palmeras v. Colombia*, Preliminary Objections, Inter-Am. Ct. H.R. (ser. C) No. 67 (Feb. 4, 2000), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_67_ing.pdf (also following the complementarity model); Dannenbaum Memo, *supra* note 30, at 9–10 (explaining the Inter-American Court's decisions).

57. *Bámaca-Velásquez*, Inter-Am. Ct. H.R. ¶ 209.

58. *Coard v. United States*, Inter-Am. C. H.R., Rep. No. 109/99, ¶ 39 (Sept. 29, 1999) (emphasis added), available at <http://www1.umn.edu/humanrts/cases/us109-99.html>.

59. *Id.* ¶ 42.

60. For states willing to follow formal derogation procedures, these conflicts may, however, be avoided for most conflicts. See *infra* notes 157–59 and accompanying text.

61. See *infra* Part IV.B.

soldiers who enjoy POW status, while human rights law envisions civilians improperly swept up in an armed conflict who enjoy the right to trial and then to release. But what if the person captured was a civilian taking part in hostilities? The Complementarity Model does not offer a tool for determining which body of law applies when the two bodies of law are irreconcilable.

A second weakness of the Complementarity Model is that the interpretive tools it does provide may undermine the very norms the model seeks to protect. In cases of tension between the two bodies of law, those applying a complementarity approach must engage in compromise to achieve harmony. This compromise might require the dilution of both bodies of law to force them into a relationship of interpretation. Or it might consist of rhetorical acrobatics that pay lip service, rather than do justice, to a rule on one side of a normative conflict. Even if this leads to the "right" outcome as applied, it creates potentially damaging precedent by eviscerating a rule that might properly apply in full force in another context.

The model described next—the Conflict Resolution Model—allows the two bodies of law to be interpreted together. Unlike the Complementarity Model, however, the Conflict Resolution Model also accounts for the existence of true conflicts between the two bodies of law and provides a tool for resolving them.

C. THE CONFLICT RESOLUTION MODEL

The Conflict Resolution Model provides that when an armed conflict is present, human rights law and humanitarian law are applied as they would be under the Complementarity Model unless they are in conflict. If they conflict, however, the model offers three possible decision rules for deciding the appropriate body of law to be applied.

As under the Complementarity Model, the existence of an armed conflict does not immediately invalidate human rights law within the zone of armed conflict. Instead, the existence of an armed conflict simply prompts an inquiry into whether human rights law and humanitarian law inform, or conflict with, one another. In this model, then, human rights law and humanitarian law obligations that govern the same conduct can have either "relationships of interpretation" or "relationships of conflict."⁶² The International Law Commission explains these terms as follows:

62. Rep. of the Int'l Law Comm'n, *supra* note 10, ¶ 2.

- *Relationships of interpretation.* This is the case where one norm assists in the interpretation of another. A norm may assist in the interpretation of another norm for example as an application, clarification, updating, or modification of the latter. In such situation, both norms are applied in conjunction.
- *Relationships of conflict.* This is the case where two legal rules that are both valid and applicable point to incompatible decisions so that a choice must be made between them.⁶³

Under the Conflict Resolution Model, when legal rules (or norms) drawn from the two bodies of law have a “relationship of interpretation,” one legal rule assists in the interpretation of another. In such cases, it is unnecessary to choose between the two applicable legal rules.⁶⁴ In cases where human rights law and humanitarian law have a “relationship of conflict,” however, the “valid and applicable” legal rules drawn from each body of law create incommensurate requirements.⁶⁵ As a result, it is necessary to look to conflict resolution rules to choose between the two.⁶⁶

Relationships of conflict may take two forms. The first is a conflict between an obligation and a permission. Many humanitarian law rules that conflict with human rights law may be characterized as permissive exceptions to baseline peacetime norms carved out to accommodate military necessity. For example, humanitarian law grants States limited permission to take the lives of combatants in the course of armed conflict.⁶⁷ The second form of conflict is a conflict between two sets of obligations. This category includes situations in which a human

63. *Id.*

64. See Droege, *supra* note 38, at 523–24. This suggests yet a third reading of the ICJ’s *Nuclear Weapons* decision (or, perhaps more accurately, a different way of presenting the second reading): the *lex specialis* provides guidance about the application of the *lex generalis* to a specific circumstance, as humanitarian law informed the application of Article 6 of the ICCPR to armed conflict in *Nuclear Weapons*. See ICCPR, *supra* note 25, art. 6(1) (“Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”).

65. Rep. of the Int’l Law Comm’n, *supra* note 10, ¶ 2.

66. See *id.*

67. It is also possible, although less common, for humanitarian law to impose an obligation where human rights law is permissive. For example, human rights law would permit a state to impose sanctions for certain crimes for which humanitarian law obligates States to grant immunity. See *infra* Part IV.B.

rights law obligation conflicts with a humanitarian law obligation such that it is impossible to comply with one without violating another. For example, humanitarian law obligates States to observe and protect local customs. When these local customs are contrary to human rights law obligations (for example, obligations to protect women from discrimination under the Convention on the Elimination of all Forms of Discrimination Against Women), the state actor might face a conflict between two sets of obligations.⁶⁸

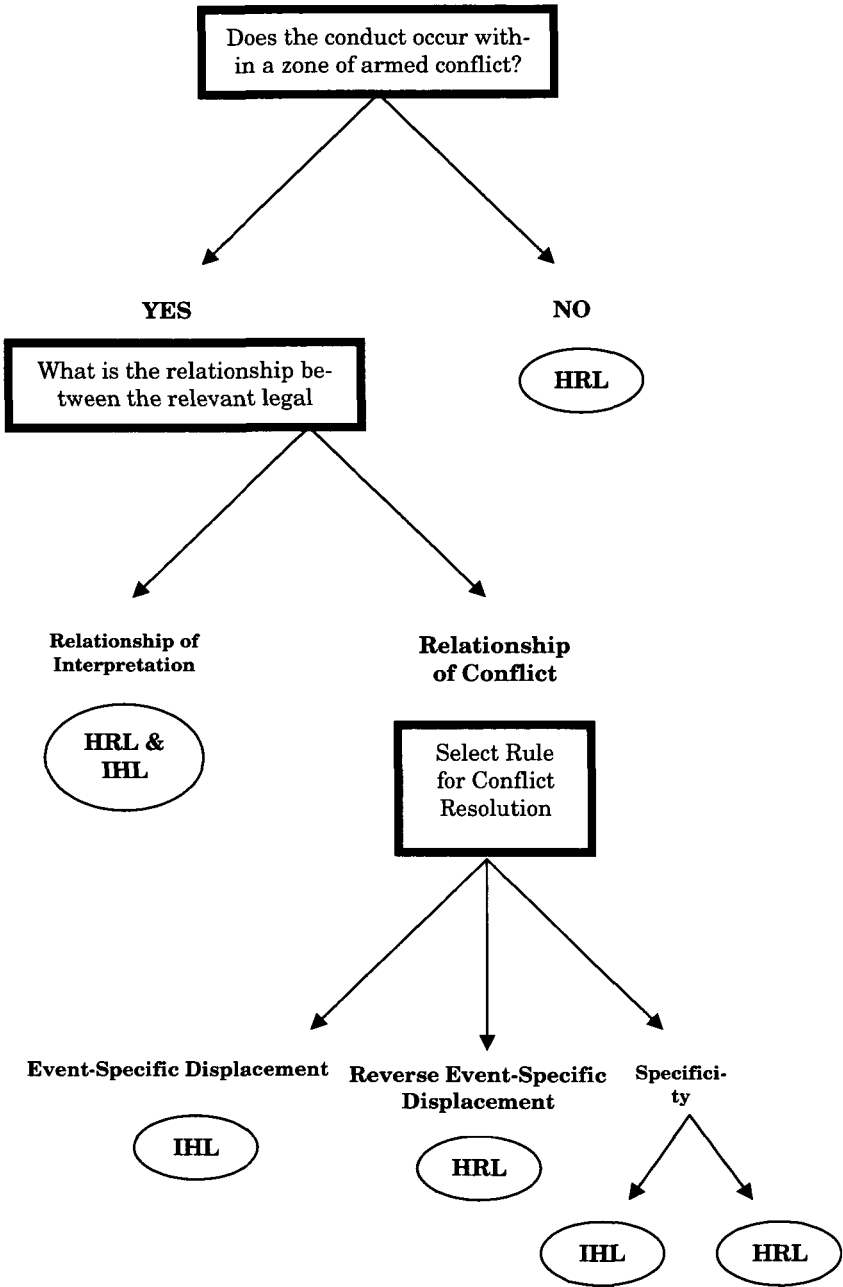
Figure 3 illustrates the decision-making process under the Conflict Resolution Model. When the two bodies of law are in a "relationship of interpretation," they are applied in conjunction with one another. The Conflict Resolution Model always treats situations in which legal rules are in a relationship of interpretation as they would be treated under the Complementarity Model. Hence, the Conflict Resolution Model is rooted in a narrower reading of the ICJ's *Nuclear Weapons* advisory opinion, in which the use of the word "arbitrary" in Article 6 of the ICCPR creates enough space for humanitarian law to define the boundaries of permissible killing without creating a normative conflict.⁶⁹ This illustrates the analytical process that goes into finding "relationships of interpretation" between the two sets of legal rules.⁷⁰

68. See *infra* Part IV.C.

69. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 25 (July 8).

70. For more on this reading of the *Nuclear Weapons* advisory opinion, see *supra* text accompanying notes 45–48.

Figure 3
Conflict Resolution Model



When legal rules are in a "relationship of conflict," the Conflict Resolution model acknowledges that a decision maker must select a rule to resolve the conflict. In this respect, it differs from the Complementarity Model, which does not acknowledge that there can be such irreconcilable conflict. It differs from the Displacement Model, as well, in that it only provides for displacement of human rights law by humanitarian law in cases where the two bodies of law conflict, leaving harmonious legal rules intact. As the International Law Commission has explained, "The maxim *lex specialis derogat legi generali* is a generally accepted technique of interpretation and conflict resolution in international law. It suggests that whenever two or more norms deal with the same subject matter, priority should be given to the norm that is more specific."⁷¹

In practice, three different rules have been applied to resolve conflicts between the two bodies of law. We term these three rules "event-specific displacement," "reverse event-specific displacement," and "specificity." When dealing with relationships of conflict, actors following the Conflict Resolution Model will arrive at different conclusions depending on which of the three decision rules for conflict resolution they select. We discuss each rule briefly in turn.

1. Rule 1: Event-Specific Displacement

An event-specific displacement approach holds that humanitarian law displaces human rights law during times of armed conflict, but only in the context of specific events in which the relevant norms of each body of law conflict. Whereas the Displacement Model outlined in Part II.A provides for displacement at the level of the armed conflict or military operation, the event-specific displacement version of the Conflict Resolution Model applies displacement only to the specific event in question. Hence human rights law may apply during times of armed conflict to events or situations where humanitarian law does not conflict. Where there is a conflict, the event-specific displacement rule of conflict resolution provides that humanitarian law is always the *lex specialis*.

The ICJ's *Wall* decision can be read to support this approach. Although the ICJ *Wall* decision accepts the applicability of human rights law during hostilities, it states that humanitarian law is the *lex specialis*: "In order to answer the question

71. Rep. of the Int'l Law Comm'n, *supra* note 10, ¶ 5.

put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.”⁷² It is possible to read this to support the view that humanitarian law prevails in instances where the two conflict. That said, this is only one possible reading, as the ICJ does not, in its decision, elect to apply humanitarian law over human rights law. Such a choice was not necessary in the case, because the legal rules in question—concerning annexation—were in a relationship of interpretation.⁷³

In contrast to the Israeli government, which, as noted earlier, has advocated the Displacement Model,⁷⁴ the Israeli High Court has adopted a position that appears to be consistent with an event-specific displacement approach. In *Public Committee Against Torture in Israel v. Government of Israel*, more commonly known as the *Targeted Killings Case*,⁷⁵ the High Court concludes that “humanitarian law is the *lex specialis* which applies in the case of an armed conflict.”⁷⁶ However, “[w]hen there is a gap (*lacuna*) in that law, it can be supplemented by human rights law.”⁷⁷ In other words, human rights law does apply in armed conflict, but only when it is not in conflict with humanitarian law. In this case, the court uses human rights law to inform humanitarian law. Additional Protocol I of the Geneva Conventions provides that “civilians shall enjoy the protections afforded by this section, unless and for such time as they take a direct part in hostilities.”⁷⁸ In interpreting the Protocol, the Court appeals to human rights standards articulated by the European Court of Human Rights, concluding that “if a terrorist taking a direct part in hostilities can be arrested, interrogated, and tried, those are the means which should be employed.”⁷⁹ Yet in determining that civilians directly participat-

72. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 106 (July 9).

73. See, e.g., *id.* ¶¶ 123–30.

74. See *supra* Part II.A.

75. HCJ 769/02 *Public Committee Against Torture in Israel v. Government of Israel* 57(6) IsrSC 285 [2006] (Isr.), http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.htm [hereinafter *Targeted Killings Case*]; see Dannenbaum Memo, *supra* note 30, at 42. Note that, like the Israeli executive branch, the High Court treats the situation in the Occupied Territories as an IAC, rather than an occupation.

76. *Targeted Killings Case*, *supra* note 75, ¶ 18.

77. *Id.*

78. AP I, *supra* note 21, art. 51(3).

79. *Targeted Killings Case*, *supra* note 75, ¶ 40. The court uses similar

ing in hostilities may be killed by the State without trial, the court directly applies humanitarian law to the exclusion of human rights law. Thus, by considering human rights law where it is not inconsistent with humanitarian law, but treating humanitarian law as the *lex specialis*, the Israeli High Court arguably employs an event-specific displacement rule of conflict resolution.

The Government of Australia has also adopted the event-specific displacement approach. "If Australia were exercising authority as a consequence of an occupation or during a consensual deployment with the consent of a Host State, in circumstances in which the principles of international humanitarian law applied," it explained, "Australia accepts that there is some scope for the rights under the [ICCPR] to remain applicable, although in case of conflict between the applicable standards under the Covenant and the standards of international humanitarian law, the latter applies as *lex specialis*."⁸⁰ Thus, human rights law is not entirely displaced by humanitarian law during times of armed conflict, but, again, humanitarian law prevails in event-specific cases of conflict.

The event-specific decision rule is attractive in part because it adopts the simplicity of the Displacement Model, but in a more fine-grained manner. It allows human rights law to remain applicable in all but those specific situations in which there is direct conflict between the two bodies of law. When the two bodies of law do conflict, it provides a clear and straightforward decision rule: displace human rights law with humanitarian law. Yet again the simplicity comes at a cost. Event-specific displacement denies that human rights law may be better designed to regulate certain hostile situations. It is therefore not well suited to the increasingly common situations in which armed conflict takes place outside the traditional battlefield. Moreover, by always displacing human rights law it comes into conflict with humanitarian law, this approach could deny jurisdiction to human rights treaty-based judicial bodies in cases in which a State allegedly violated its human rights obligations.

reasoning to conclude that the state must follow up any targeted killing with an independent investigation, an human rights law duty for which the Court again cites European Court of Human Rights cases and other human rights authorities. *Id.*

80. Human Rights Comm., Replies to the List of Issues To Be Taken Up in Connection With the Consideration of the Fifth Periodic Report of the Government of Australia, ¶ 19, U.N. Doc. CCPR/C/AUS/Q/5/Add.1 (Feb. 5, 2009).

2. Rule 2: Reverse Event-Specific Displacement

The reverse event-specific displacement rule is, as its name suggests, the mirror image of the event-specific displacement rule: While the event-specific displacement rule always resolves conflicts between the two bodies of law in favor of human rights law, the reverse event-specific displacement rule always resolves conflicts between the two bodies of law in favor of human rights law. Unlike the other two rules described here, the reverse event-specific displacement rule has resulted entirely from jurisdictional constraints on the courts themselves.

Two courts—the Inter-American Court for Human Rights and the European Court of Human Rights—apply this rule because their primary jurisdictional mandate is to interpret human rights treaties.⁸¹ Thus, while they may look to humanitarian law norms for guidance in interpretation, their mandates create a decision rule that favors human rights law.

To illustrate, consider the Inter-American Court for Human Rights' *Las Palmeras* decision. There the court criticized the Inter-American Commission on Human Rights for directly applying humanitarian law norms that are not present in, and conflict with, the American Convention on Human Rights. The Inter-American Court conceded that it may evaluate "any norm of domestic or international law applied by a State, in times of peace or armed conflict," but it clarified that it was competent only to determine if the norm "is compatible or not with the American Convention," which codifies applicable human rights law.⁸² It continued:

In order to carry out this examination, the Court interprets the norm in question and analyzes it in the light of the provisions of the Convention. The result of this operation will always be an opinion in which the Court will say whether or not that norm or that fact is compatible with the American Convention. The latter has only given the Court competence to determine whether the acts or the norms of the States are compatible with the Convention itself, and not with the 1949 Geneva Conventions.⁸³

81. See Convention for the Protection of Human Rights and Fundamental Freedoms, Sept. 3, 1953, 213 U.N.T.S. 222 (establishing the ECHR); Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2420, as amended by The Protocol of Buenos Aires art. 106, Feb. 27, 1967, 21 U.S.T. 607 (providing that the "principal function shall be to promote the observance and protection of human rights").

82. *Las Palmeras v. Colombia*, Preliminary Objections, Inter-Am. Ct. H.R. (ser. C) No. 67, ¶ 32 (Feb. 4, 2000).

83. *Id.* ¶ 33.

Thus, when humanitarian law is incompatible with the American Convention—where the legal rules from each body of law share a relationship of conflict—the court is jurisdictionally constrained to base its judgment on the American Convention only.⁸⁴

The European Court of Human Rights has similar restrictions. It, too, is strictly limited to adjudicating cases under the European Convention on Human Rights, which codifies applicable human rights law.⁸⁵ In *McCann v. United Kingdom*, the European Court found that the United Kingdom had violated Article 2 of the European Convention in its antiterrorist operations against Irish Republican Army operatives in Gibraltar.⁸⁶ Although the European Court acknowledged that the soldiers reasonably perceived the use of lethal force to be necessary, it held in favor of McCann because the operation was not designed to make killing a last resort, as required under human rights law.⁸⁷ Hence, it applied human rights law to the exclusion of humanitarian law where the two were in conflict.

The reverse event-specific displacement rule has thus far been applied only by courts that have exclusive jurisdiction over human rights law. Like event-specific displacement, it has the virtue of simplicity. But it is unlikely to be widely adopted because it is plagued by the same problem as event-specific displacement, but in mirror image: reverse event-specific displacement denies the reality that humanitarian rights law may sometimes be better designed to regulate certain hostile situations. We thus turn to the third and final decision rule.

3. Rule 3: Specificity

The rule of specificity provides that in relationships of conflict between the two bodies of law, the law more specifically tailored to the situation prevails.⁸⁸ As with the other rules outlined here, the specificity rule applies at the level of an event or

84. See also Dannenbaum Memo, *supra* note 30, at 9.

85. For an extensive discussion of European Court of Human Rights treatment of conduct in armed conflict, see *id.* at 19–21.

86. *McCann v. United Kingdom*, 324 Eur. Ct. H.R. (ser. A) at 64 (1995) (holding by a ten to nine vote a violation of Article 2 of the Convention). For other examples of European Court of Human Rights cases employing this approach, see *Isayeva, Yusupova and Bazayeva v. Russia*, 41 Eur. Ct. H.R. 39 (2005); *Isayeva v. Russia*, 41 Eur. Ct. H.R. 38 (2005).

87. *McCann*, 324 Eur. Ct. H.R. (ser. A) at 20–90; see also Dannenbaum Memo, *supra* note 30, at 19.

88. See Droege, *supra* note 38, at 522–23.

situation rather than at the level of the armed conflict. In contrast with the other two decision rules, however, the specificity rule does not presuppose that either humanitarian law or human rights law is *always* the *lex specialis*. Rather, it looks to which body of law is more specific to the situation at hand.⁸⁹

This approach to resolving the conflict between humanitarian law and human rights law is the best available approach to a complex problem. The specificity approach gives the widest possible ambit for complementary application of the two bodies of law—applying the two together when they are consistent or “regulate different aspects of a situation or regulate a situation in more or less detail”⁹⁰—while addressing the inevitable conflicts by tailoring the legal rule to the context in which it operates. Whereas the other two conflict resolution rules ignore the situational context by predetermining which law should apply to it, the specificity rule allows for tailoring the choice of law to best suit the particular situation. It therefore avoids many of the weaknesses of other models, while offering a key benefit of its own.

But it has a notable drawback. In contrast with the event-specific displacement and reverse event-specific displacement rules, the specificity approach lacks a consistent preemption rule and the simplicity that comes with it. Instead of always applying humanitarian law over human rights law in cases of conflict between the two bodies of law or vice versa, it calls for a judgment to be made regarding the most relevant law in each instance. Indeed, a key feature of the specificity approach is its dependence on facts—as circumstances change, so will the most specific law.

The specificity rule’s greatest strength is therefore also its greatest weakness: because the relevant law changes depending on the situation, the approach may seem impractical or unworkable.⁹¹ The numerous considerations add nuance but also make the rule difficult to apply absent specific contextual facts. Although very useful for ex post review of conduct during

89. *Id.* at 524.

90. Droege, *supra* note 31, at 343–44.

91. The Legal Advisor for the International Committee of the Red Cross, Cordula Droege, notes, “[t]here may be controversy as to which norm is more specialized in a concrete situation,” and indeed an abstract determination of an entire area of law as being more specific towards another area of law is not, in effect, realistic. *Id.* at 340; see Dannenbaum Memo, *supra* note 30, at 11. Note that this position differs from the official position of the ICRC, which favors the complementarity approach. See Kellenberger, *supra* note 42.

armed conflict, the rule complicates *ex ante* decision making, particularly on the ground.

Yet the weakness is not as severe as it may at first seem. Truly unavoidable relationships of conflict between the two bodies of law are discrete, predictable, and rare.⁹² Most human rights norms are derogable in times of emergency.⁹³ Moreover, because relationships of conflict may be accounted for *ex ante*, some legal rules are clearly identifiable as the *lex specialis* by their design. For example, humanitarian law regulating treatment of POWs is specifically and clearly designed to apply to any instance in which a State captures members of the armed forces of a state with which it is engaged in armed conflict.⁹⁴ Only in a few, limited cases will it be difficult to predict which body of law will provide the *lex specialis*. In these cases, it is not clear that other models for resolving conflict between the two bodies of law serve decision makers any better. For example, the Displacement Model is straightforward once one identifies the zone of armed conflict, but that preliminary inquiry is highly complicated and becomes extremely high-stakes.

Using the Conflict Resolution Model as a guide, government policy makers can identify foreseeable relationships of conflict and develop rules to address them.⁹⁵ These individuals are well-positioned to apply the specificity rule with all its complexities and convert their conclusions into manuals, like the Uniform Code of Military Justice. That way, on-the-ground decision makers can apply rules that have already been run through the Conflict Resolution Model. This underscores the importance of carefully examining these two bodies of law before making critical policy decisions. This kind of approach can achieve predictability, protection of human dignity, and decisiveness on the battlefield.

We turn in the next Part to explaining the specificity rule of the conflict resolution model in greater detail, showing how it has been used by international bodies and states in practice, and outlining five key factors that should guide those using the rule to determine the applicable body of law.

92. See Gabrielle Marceau, *WTO Dispute Settlement and Human Rights*, 13 EUR. J. INT'L L. 753, 756 (2002).

93. See *infra* Part IV.

94. See generally Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135 (entered into force Oct. 21, 1950) (outlining the treatment of POWs in armed conflicts).

95. See *infra* Part IV.

III. THE SPECIFICITY RULE OF CONFLICT RESOLUTION

The specificity rule of conflict resolution applies humanitarian and human rights law in conjunction—using them to inform one another—whenever possible. When the two bodies of law are in direct conflict, however, it provides a decision rule for choosing between the two that turns on which legal rule is most specific to the situation.

To illustrate this approach, we begin here by showing how the specificity model has been used in real-world situations to resolve conflicts between the two bodies of law, demonstrating that courts can and have successfully apply the test. Second, to further clarify the test and show how it may be applied to a wide variety of situations in which there is a conflict between human rights law and humanitarian law, we outline and describe five factors to guide the choice between the two bodies of law. This sets the stage for the next Part, in which we describe four specific conflicts between humanitarian law and human rights law and show how they can be best resolved using this specificity rule.

A. THE SPECIFICITY RULE IN PRACTICE

The specificity approach has been adopted and used by States to resolve specific conflicts. A number of countries, including Canada and Germany, have indicated that they subscribe to versions of this approach. For instance, in a brief in *Amnesty International Canada v. Chief of the Defence Staff for the Canadian Forces*, the Canadian Government stated:

A state's international human rights obligations, to the extent that they have extraterritorial effect, are not displaced [in armed conflict]. However, the relevant human rights principles can only be decided by reference to the law applicable in armed conflict, the *lex specialis* of IHL. Critically, in the event of an apparent inconsistency in the content of the two strands of law, the more specific provisions will prevail: in relation to targeting in the conduct of hostilities, for example, human rights law will refer to more specific provisions (the *lex specialis*) of humanitarian law.⁹⁶

Canada thus argued that humanitarian law is more specific to the conduct under review—"targeting in the conduct of hostilities"—and therefore it is the *lex specialis*. The government is

96. Respondents' Factum Re: Determination of Two Questions, Pursuant to Rule 107 of the Federal Courts Rules, Regarding the Application of the Canadian Charter of Rights and Freedoms at 26, *Amnesty Int'l Canada v. Canada* [2009] 4 F.C.R. 149 (No. T-324-07) (Can.) (internal citations and quotations omitted).

careful to note that only “specific provisions . . . of humanitarian law” become the *lex specialis*, not the entire body of law.

The German Government has taken a similar stance, tailoring its instructions to the relevant body of law as follows:

Wherever its police or armed forces are deployed abroad, in particular when participating in peace missions, Germany ensures to all persons that they will be granted the rights recognized in the [ICCPR], insofar as they are subject to its jurisdiction The training it gives its security forces for international missions includes tailor-made instruction in the provisions of the Covenant.⁹⁷

Many State parties to the Convention on the Rights of the Child⁹⁸ have also adopted the specificity approach in drafting the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict.⁹⁹ The Protocol prohibits state parties and non-state armed parties from recruiting children for military service in armed conflicts.¹⁰⁰ In the preamble, state parties recall their obligations to protect children from violence under human rights and humanitarian law, but they emphasize their duties under the latter.¹⁰¹ The Protocol specifies that state parties should use the specificity approach when human rights and humanitarian obligations conflict, applying the body of law most able to protect children from violence: “Nothing in the present Protocol shall be construed as precluding provisions in the law of a State Party or in international instruments and international humanitarian law that are more conducive to the realization of the rights of the child.”¹⁰²

Three separate Inter-American Commission decisions illustrate the three different outcomes that can result from using

97. U.N. Human Rights Comm., *Comments by the Government of Germany to the Concluding Observations of the Human Rights Comm.*, U.N. Doc. CCPR/CO/80/DEU/Add.1, at 3 (Apr. 11, 2005).

98. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

99. Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, G.A. Res. 54/263, 54th Sess, U.N. Doc. A/RES/54/263 (May 25, 2000).

100. *Id.* arts. 1–4.

101. The Preamble to the Optional Protocol notes the various prohibitions on violence against children in armed conflict in the Rome Statute, ICRC commentary, and International Labour Organization Convention No. 182. It further recalls generally “the obligation of each party to an armed conflict to abide by the provisions of international humanitarian law.” *Id.* pmbl.

102. *Id.* art. 5.

the specificity version of the Conflict Resolution Model.¹⁰³ First, in *Avilán v. Colombia*, the Inter-American Commission found a relationship of interpretation among human rights law and humanitarian law governing the extrajudicial execution of individuals *hors de combat*.¹⁰⁴ In that opinion, the Commission reasoned that “[i]t is precisely in situations of internal armed conflict that human rights and humanitarian law converge most precisely and reinforce one another.”¹⁰⁵ This decision illustrates the way in which the specificity model—like the other conflict resolution models—applies both bodies of law in a relationship of interpretation whenever possible.

Second, in *Abella v. Argentina*, the Inter-American Commission resolved a conflict between the two bodies of law in favor of humanitarian law. The case required the Commission to determine whether the killing of attackers in the La Tablada battle in Argentina violated Article 4 of the American Convention.¹⁰⁶ After noting that Article 4 creates a non-derogable right to life, the Commission determined that it provides little guidance in situations of armed conflict, as it does not distinguish between civilians and combatants. Instead, the Inter-American Commission turned to Common Article 3 of the Geneva Conventions to conclude that there had been no rights violation.¹⁰⁷ Upon identifying the casualties as combatants, the Inter-American Commission did not consider any human rights law-based “requirements to warn, attempt to arrest, or shoot to injure rather than kill.”¹⁰⁸ There was a relationship of conflict between these potential human rights law obligations, rooted in the American Convention, and the implicit humanitarian law permission to abandon these precautions in battle. The Inter-American Commission resolved the conflict in favor of humanitarian law because humanitarian law was more specifically tailored to the situation.

103. This is the same tripartite structure that Tom Dannenbaum ultimately recommends in his memo to the Lowenstein Clinic. See Dannenbaum Memo, *supra* note 30, at 69.

104. *Avilán v. Colombia*, Case 11.142, Inter-Am. Comm’n H.R., Report No. 26/97, OEA/Ser.L.V/II.95, doc. 7 rev. ¶ 140 (1997).

105. *Id.* ¶ 174. Note that the same is arguably true of occupation. See *infra* text accompanying note 108. For a further explanation of the case, see Dannenbaum Memo, *supra* note 30, at 31–33.

106. *Abella v. Argentina*, Case 11.137, Inter-Am. Comm’n H.R., Report No. 55/97, OEA/Ser.L.V/II.95, doc. 7 rev. ¶ 5 (1997).

107. *Id.* ¶¶ 156, 161, 188; see also Dannenbaum Memo, *supra* note 30, at 30–31.

108. Dannenbaum Memo, *supra* note 30, at 31.

Third, in its *Third Report on the Human Rights Situation in Colombia*,¹⁰⁹ the Inter-American Commission resolved a conflict between the two bodies of law in favor of human rights law, despite the fact that it acknowledged the existence of an armed conflict in the country.¹¹⁰ The Inter-American Commission applied humanitarian law to certain conduct within Colombia. But when faced with the extrajudicial killings of “marginal groups” engaged in criminal activities, it applied a “pure” human rights law enforcement standard.¹¹¹ Even though humanitarian law exists for situations of non-international armed conflict, the Commission found human rights law to be more specifically tailored to the State’s treatment of criminal activity.¹¹²

Thus, the jurisprudence of the Inter-American Commission demonstrates the full range of outcomes possible under the specificity approach. By applying a specificity rule of conflict resolution, the Inter-American Commission has determined that the governing body of law depends on the relationship between the applicable legal rules and the particular circumstances to which the legal rules are to be applied. Put differently, the Commission has found itself, at different times, at each possible outcome of the Conflict Resolution Model.

Together, these examples demonstrate that although the specificity rule is more complex than either the event-specific or reverse event-specific displacement rules, governments, courts, and international organizations have nonetheless successfully used the approach. In doing so, they have applied legal rules that are most appropriate and most closely tailored to the circumstances of the case, giving maximum effect to each body of law in situations in which they are most specific and relevant.

Yet more still can be done to clarify this approach and thereby make it more functional and accessible to a wider variety of decision makers. In the next Section, we begin this project by outlining five factors that should be used in applying the specificity rule. These five factors offer detailed guidance to de-

109. Inter-Am. Comm’n H.R., *Third Report on the Human Rights Situation in Colombia*, OEA/Ser.L/V/II.102, doc. 9 rev. 1 (1999) [hereinafter *Colombia Report*].

110. See *id.* ch. 1, at ¶ 20 (discussing how drug trafficking groups “began to finance and support the paramilitary groups”).

111. See *id.* ch. 4, at ¶ 213 (applying Article 4 of the American Convention to police responses to the “marginal groups”).

112. See Dannenbaum Memo, *supra* note 30, at 33–34, for a more detailed account of the case.

cision makers seeking to determine which body of law is more specific to any particular event.

B. FIVE FACTORS FOR DETERMINING SPECIFICITY

Drawing on a variety of sources—including prior case law, scholarship, and governing treaties—we propose five factors to guide States and courts in using the specificity rule to choose between humanitarian law and human rights law in the event of an irreconcilable conflict between them. To determine which body of law is more specific, States and courts should consider: (1) the wording and content of the norms themselves; (2) the nature of the norms in question, (3) whether a State exercises effective control, (4) expressions of intent by parties to relevant treaties, and (5) state practice. We discuss each in turn.

1. Wording and Content of Norms

As a starting point, it is important to look to the text of the rule of law that is being applied. When a norm uses terms that make it uniquely relevant to the conduct at hand, that rule may become the *lex specialis*.¹¹³ For this reason, much existing practice favors treating humanitarian law as the *lex specialis* during instances of armed conflict.¹¹⁴ For example, in determining the proper treatment of combatants involved in an armed conflict, humanitarian law frequently is treated as the *lex specialis* because, among other things, it distinguishes between combatants and civilians.¹¹⁵ There is still room, however, for human rights law to prevail in special circumstances, especially during occupation and non-international armed conflict; it is in these circumstances that the specificity approach is most likely to depart from the event-specific displacement approach outlined above.¹¹⁶

113. See Droege, *supra* note 38, at 522 (“[The concept of *lex specialis*] stems from a Roman principle of interpretation according to which, in situations especially regulated by a specific rule, this rule would displace the more general rule.”).

114. See Droege, *supra* note 31, at 318 (“As is well-known, most human rights can be derogated from in time of public emergency, which includes situations of armed conflict.”).

115. See, e.g., *Abella v. Argentina*, Case 11.137, Inter-Am. Comm’n H.R., Report No. 55/97, OEA/Ser.L/V/II.95, doc. 7 rev. ¶¶ 152–53 (1997) (discussing the application of humanitarian law to the conflict).

116. See Droege, *supra* note 38, at 524–29 (noting the complex interplay of human rights law and humanitarian law in the areas of occupation and noninternational armed conflict).

2. The Nature of the Norms in Question

In addition to the wording and content, it is important to consider the nature of the norms in question. For example, does the relationship of conflict exist between a human rights law obligation and a humanitarian law permission or does it exist between two obligations?¹¹⁷ As noted above, in many cases humanitarian law creates *permissions*—exceptions carved out to accommodate military necessity (for example, permission to kill enemy combatants in the context of armed conflict).¹¹⁸ Humanitarian law also generates *obligations*, some of which may create protections that even go beyond those provided by human rights law (for example, the obligation not to try POWs and to release them at the end of the armed conflict).¹¹⁹ Where humanitarian law creates an *obligation* on a State, it is more likely to be the *lex specialis*.¹²⁰ In contrast, whether a humanitarian law permission is the *lex specialis* depends largely on the other four factors.

3. Effective Control

There is an emerging international consensus that states have an obligation to observe human rights obligations wherever they exercise effective control. Effective control is also an important factor for determining whether humanitarian law or human rights law is more specific to a particular situation. Where a State exercises greater effective control on the ground, that counsels in favor of applying human rights law as the more specifically tailored and relevant body of law.¹²¹ For instance, in occupation,¹²² a state actor may exercise significant territorial control, and therefore human rights law may be the more specific body of law applicable to that State's actions.¹²³

117. See *supra* text accompanying notes 60–62.

118. See ICRC, *supra* note 21, at 3–8 (discussing how combatants are viewed under humanitarian law).

119. See GC III, *supra* note 13, art. 4 (relating to the treatment of POWs during armed conflict).

120. Cf. Droege, *supra* note 38, at 524 (stating that if a rule creates an exception to a general rule it is more likely to be the *lex specialis*, which would be the case if a rule created a permission).

121. Cf. *id.* at 525–29 (discussing how humanitarian law rests in part on the premise that a government needs to be able to weaken the military forces of its enemies).

122. See *id.* at 537–39 (describing occupation and how humanitarian versus human rights law could apply).

123. See, e.g., Human Rts. Comm., General Comment No. 31 on Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States

Conversely, when States exercise less control, humanitarian law is more likely to be the appropriate body of law in cases of conflict between the two.¹²⁴ Paradigmatically, the scope of States' human rights obligations is limited during battlefield hostilities because the States lack effective control.¹²⁵ During active armed conflict, the exigencies of war expand the scope of permissible action, while chaos, fear, and timing limit the capacity of States to meet obligations reasonably expected of them in other contexts, counseling in favor of applying humanitarian law as the *lex specialis*.¹²⁶

U.N. bodies have endorsed the view that state actors have greater responsibility to honor human rights obligations when and where they exercise greater effective control, particularly during occupation.¹²⁷ The U.N. General Assembly cautioned the Soviet Union about its human rights obligations during its occupation of Hungary as early as 1956.¹²⁸ In 1967, during the Six Days War, the U.N. General Assembly reminded Israel that "essential and inalienable human rights should be respected even during the vicissitudes of war."¹²⁹ The unique nature of occupation may also explain why the ICJ changed the tenor of its jurisprudence on this question in *DRC v. Uganda*.¹³⁰ In that case, it did not identify humanitarian law as the *lex specialis*—as it had in its *Nuclear Weapons* and *Wall* opinions—but instead emphasized its earlier statements on the applicability of human rights law to extraterritorial State activity during occupation.¹³¹

Parties to the Covenant, ¶ 10, U.N. Doc. CCPR/C/74/CRP.4/Rev.6 (May 26, 2004) (using a government's "effective control" of a territory in determining which body of international law applies).

124. *Id.*

125. See Droege, *supra* note 31, at 330 ("[W]ith varying degrees of control, the state has varying obligations, going from the duty to respect to the duties to protect and fulfil [sic] human rights.").

126. See *id.* at 347 (arguing that humanitarian law should apply in situations where "government forces [have] no real control" over the situation); see also Dannenbaum Memo, *supra* note 30, at 11 (citing Droege, *supra* note 31)).

127. See Droege, *supra* note 38, at 537–39 (describing occupation's implications for determining the applicable rule of law).

128. *Id.* at 504–05; see also G.A. Res. 1312 (XIII), 13th Sess., U.N. Doc. A/38/49 (Dec. 12, 1958).

129. S.C. Res. 237, pmbl. ¶ 2, U.N. Doc. A/237/1967 (June 14, 1967).

130. See Droege, *supra* note 31, at 522 (discussing the ICJ's seemingly inexplicable change of course in this case).

131. Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, ¶ 216 (Dec. 19, 2005).

As the ICJ's opinion in *DRC v. Uganda* reveals, effective control has gained traction as the guiding principle for extra-territorial application of human rights.¹³² It is important to note, however, that effective control factors into the equation differently when it is used to determine whether human rights law preempts humanitarian law than when it is used to determine whether human rights law applies at all.¹³³ The two applications dovetail in *DRC v. Uganda* because their underlying premise is the same: territorial control increases the responsibility of the State to fulfill its human rights obligations.¹³⁴ Thus, according to some, human rights law sometimes preempts humanitarian law in zones of effective control.¹³⁵ But the difference in the question—does human rights law apply, as opposed to does human rights law preempt—can lead to very different outcomes.

First, in addition to being arguably dispositive outside the sovereign territory of a State in determining the applicability of human rights law, effective control is also a relevant consideration within the sovereign territory when used as a component of the specificity approach.¹³⁶ While human rights law presumptively *applies* within the sovereign territory—thus requiring no effective control test—it does not necessarily *preempt* humanitarian law in situations of a noninternational armed conflict that occurs entirely within the sovereign territory of a single State.¹³⁷ A court applying the specificity rule of conflict resolu-

132. See Hathaway et al., *supra* note 27, at 390 (discussing how most international jurisdictions have adopted the “effective control” test).

133. See, e.g., *id.* at 393–94 (discussing the competing arguments as to whether the Covenant or Convention Against Torture apply to U.S. actions abroad).

134. See *Uganda*, 2005 I.C.J. ¶ 189 (“The DRC charges that Uganda breached its obligation of vigilance incumbent upon it as an occupying Power by failing to enforce respect for human rights and international humanitarian law in the occupied regions, and particularly in Ituri.”).

135. See, e.g., *id.* ¶ 248 (“The Court further observes that the fact that Uganda was the occupying Power in Ituri district . . . extends Uganda’s obligation to take appropriate measures to prevent the looting, plundering and exploitation of natural resources in the occupied territory to cover private persons in this district and not only members of Ugandan military forces.”).

136. See, e.g., Droege, *supra* note 38, at 527 (“[I]t is relatively uncontroversial that the rules regulating the conduct of hostilities . . . are part of a customary international humanitarian law applicable to non-international armed conflicts.”).

137. See *id.* at 530–33 (surveying the case law of the European Court of Human Rights on the issue of whether human rights law preempts humanitarian law in these situations).

tion might consider the degree to which the government of that State exercises effective control over the hostile situation to determine whether human rights law or humanitarian law prevails in that situation.¹³⁸

Second, in determining the *lex specialis*, the presence of effective control is not decisive by itself.¹³⁹ For example, prisoners of war may be within the effective control of a State, but the wording and content of the norms, as well as extensive state practice, indicates that they should not be charged with murder for lawful battlefield killings—actions for which they are legally immune under humanitarian law.¹⁴⁰ In such cases, effective control should not lead States to enforce human rights trial norms, for doing so would effectively strip prisoners of war of their immunity.¹⁴¹ In this case, humanitarian law is clearly the *lex specialis* despite the State's effective control.¹⁴² As noted above, effective control may be more relevant to situations where humanitarian law grants states *permission* and less relevant where humanitarian law imposes *obligations* on states, in part because the special obligations may be born of conditions other than military necessity.¹⁴³

This distinction has two important implications. First, it means that actors applying the specificity model must often consider additional factors beyond effective control to resolve the normative conflict between the two bodies of law. Second, it means that an actor need not accept that the extraterritorial application of human rights law turns on effective control in order to accept the relevance of effective control for resolving conflicts between the two bodies of law. A decision-maker may use an entirely different rule to determine whether human rights law applies but still look to effective control to determine whether applicable human rights law prevails.

138. See, e.g., *Abella v. Argentina*, Case 11.137, Inter-Am. Comm'n H.R., Report No. 55/97, OEA/Ser.L/V/II.95, doc. 7 rev. ¶193 (1997) (suggesting that human rights law should apply after the arrest of attackers, due in part to the state's level of control); see also *supra* notes 106–08 and accompanying text (discussing the *Abella* case).

139. See Droege, *supra* note 31, at 332 (discussing how the threshold determinations for “effective control” differ between the application of humanitarian law versus human rights law).

140. See discussion *infra* Part IV.B.

141. *Id.*

142. See GC III, *supra* note 13, art. 4 (delineating the law to be applied to POWs with specificity so as to render it the *lex specialis*).

143. See discussion *supra* Part III.B.2.

4. Expressions of Intent

The fourth consideration—expressions of intent—derives from Article 31 of the Vienna Convention on the Law of Treaties, which provides that treaties should be interpreted in light of their purpose, as expressed variously through agreements of the parties and instruments drawn up by individual parties in preparation for ratification.¹⁴⁴

In the Inter-American Commission's decision in *Avilán v. Colombia*, for example, the Commission cited a previous expression of intent by the Government of Colombia to support a decision not to apply a law of war framework to extra-judicial killing, but rather to apply human rights law norms.¹⁴⁵ The Commission explained:

[T]here are additional elements that lead the Commission to consider that the victims were defenseless when assassinated by members of the police. For example, the judgment of the Administrative Tribunal of Cundinamarca, of June 3, 1993, held that the State was responsible for the death of four of the individuals and ordered that compensation be paid, rejecting the argument of legitimate action in combat¹⁴⁶

Hence, the Colombian State had previously indicated its intent to consider the relevant conduct outside the law of war framework, and the Inter-American Commission used this expression of intent to come to its own decision.¹⁴⁷

5. State Practice

State practice under the various instruments of humanitarian law and human rights law helps to reveal their proper scope and relationship to one another. As Article 31(3)(b) of the Vienna Convention on the Law of Treaties explains: treaty interpretation should be guided by "[a]ny subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."¹⁴⁸ Hence, state prac-

144. Vienna Convention on the Law of Treaties, art. 31, May 23, 1969, 1155 U.N.T.S. 331.

145. *Avila v. Colombia*, Case 11.142, Inter-Am. Comm'n H.R., Report No. 26/97, OEA/Ser.L/V/II.95, doc. 7 rev. ¶ 165 (1997) ("The State argued that it did not dispute that members of the police killed the victims named in this case. Nonetheless, the State considered that these deaths did not involve violations of the victims' rights because they occurred as the result of the legitimate use of force by State agents.").

146. *Id.* ¶ 136.

147. *Id.*

148. Vienna Convention on the Law of Treaties, *supra* note 144, art. 31(3)(b).

tice informs treaty interpretation and helps to shape a customary law of *lex specialis*.¹⁴⁹

For example, human rights law requires States (with narrow exceptions not relevant here) to bring any person deprived of their liberty to trial for a valid criminal offense within a reasonable period,¹⁵⁰ while humanitarian law permits States to intern enemy combatants as prisoners of war for the duration of hostilities and prohibits States from subjecting them to trial except for war crimes or for crimes committed during their internment.¹⁵¹ In resolving this conflict under the specificity rule, the “effective control” factor would suggest that, since prisoners of war are under the detaining State’s control, human rights law should govern.¹⁵² However, there is a wealth of state practice indicating that humanitarian law, not human rights law, properly governs the detention of enemy combatants without trial during international armed conflicts.¹⁵³ Indeed, the provisions of the Third Geneva Convention on the detention of prisoners of war during international armed conflict are generally recognized as customary international law.¹⁵⁴ Thus state practice—together with the nature of the norms in conflict (a humanitarian law obligation and a human rights law obligation)—suggest that humanitarian law is the *lex specialis*, even though the State exercises “effective control” over the enemy combatant.

Having laid out the specificity test, we turn next to examining the stakes of this decision rule by looking at when the two bodies of law are truly in conflict—and therefore where the mechanism for choosing between the two comes into play.

149. See Droege, *supra* note 31, at 542–46 (more on the expressive influence of court jurisprudence).

150. See discussion *infra* Part IV.B (right to trial); see also ICCPR, *supra* note 25, art. 9 (“Anyone arrested or detained on a criminal charge shall be brought promptly before a judge . . .”).

151. See GC III, *supra* note 13, art. 4 (regarding the treatment of POWs during armed conflicts).

152. See discussion *supra* Part III.B.3.

153. See, e.g., Hathaway, et al., *supra* note 27, at 400–04 (discussing examples of how the European Court of Human Rights has applied its analysis to this type of conflict of laws).

154. See ICRC, *supra* note 21, at 344–45 (discussing the Third Geneva Convention and its application in international law).

IV. THE STAKES: WHEN THE TWO BODIES OF LAW CONFLICT

Here we explore the stakes of the choice between human rights law and humanitarian law by examining several areas in which human rights law and humanitarian law have conflicting legal rules. While the areas of law examined here—the right to life, detention and the right to trial, women’s rights, and the rights of free expression, association, and movement—include the most significant areas of conflict between the two bodies of law, this discussion is intended to be illustrative rather than exhaustive. For each area of law, we lay out the relevant human rights law, the relevant humanitarian law, and the ways in which each of the models outlined in Part II of this Article would resolve conflict between them. For purposes of this discussion, we focus on the human rights obligations imposed by customary international law, the ICCPR, and CEDAW.¹⁵⁵

155. We recognize that the U.S. representatives have taken the position that the ICCPR does not apply extraterritorially. See Letter of Kevin Moley, *supra* note 26 (stating that it is not the position of the United States that the ICCPR applies extraterritorially); see also Michael J. Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation*, 99 AM. J. INT’L L. 119, 125 (2005) (“States have also expressed disagreement with the Committee’s view that the Covenant applies to acts of a state’s armed forces performed outside that state’s territory.”). That view, however, is not accepted by the Human Rights Committee and is generally regarded as an outlier position. See, e.g., Human Rights Comm., *Comments of the Human Rights Committee on the International Covenant on Civil and Political Rights*, ¶ 284, U.N. Doc. CCPR/C/79/Add.50 (Oct. 3, 1995) (“The Committee does not share the view expressed by the Government that the Covenant lacks extraterritorial reach under all circumstances.”). Moreover, the ICCPR includes several norms that create potential conflicts with humanitarian law norms. See, e.g., Letter of Kevin Moley, *supra* note 26 (arguing that the ICCPR leads to an absurd result in that “during an ongoing armed conflict, unlawful combatants receive more procedural rights than would lawful combatants under the Geneva Conventions”). In addition, we address CEDAW despite the fact that the United States has not ratified the Convention. See Div. for the Advancement of Women, Dep’t of Econ. & Soc. Affairs, *Convention on the Elimination of All Forms of Discrimination Against Women: State Parties*, U.N. <http://www.un.org/womenwatch/daw/cedaw/states.htm> (last visited Feb. 28, 2012) (showing the countries who have ratified CEDAW). We do so because, (1) Afghanistan has ratified CEDAW, and it therefore arguably applies to U.S. activities in Afghanistan conducted with the Afghan government’s consent; (2) some of the norms embodied in CEDAW are considered by some to be binding as customary international law; and (3) CEDAW remains before the Senate. See *id.*; see also LUISA BLANCHFIELD, CONG. RESEARCH SERV., R 40750, THE U.N. CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW): ISSUES IN THE U.S. RATIFICATION DEBATE 4 (2011) (discussing how CEDAW remains before the U.S. Senate); Bharathi

As a preliminary matter, it is important to note that, with the exception of the obligations to protect the right to life under the ICCPR and women's rights under CEDAW, all of the human rights obligations discussed in this Part are derogable.¹⁵⁶ Derogation allows States to temporarily abrogate an obligation under exceptional emergency circumstances.¹⁵⁷ Thus, where permitted and accepted by courts, derogation can resolve conflicts between the two bodies of law.¹⁵⁸ In order to derogate, however, a State must notify other parties to the relevant human rights instrument and must explain which provisions it is derogating and its reasons for doing so.¹⁵⁹ This public procedure significantly raises the political costs of derogation.¹⁶⁰ Indeed, it implicitly acknowledges that the actions taken might violate human rights law in the absence of the derogation.¹⁶¹ For this reason, States rarely formally derogate from their human rights obligations.¹⁶² The remainder of this Part will assume that the State to which the law applies has not formally derogated from its relevant human rights obligations. However, unless the discussion notes that an obligation is nonderogable,

Anandhi Venkatraman, *Islamic States and the United Nations Convention on the Elimination of All Forms of Discrimination Against Women: Are the Shari'a and the Convention Compatible?*, 44 AM. U. L. REV. 1949, 1953 (1995) ("[T]he Women's Convention serves as an international treaty for those countries that have ratified it.").

156. See discussion *infra* Part IV.B (right to trial), and Part IV.D (rights to freedom of expression, association, and movement).

157. See, e.g., ICCPR, *supra* note 25, art. 4 ("In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.").

158. *Id.*

159. See, e.g., *id.* ("Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.").

160. Cf. Dennis, *supra* note 155, at 135–36 (discussing state practice in derogating from ICCPR obligations).

161. *Id.*

162. See *id.* ("[N]ot one state has submitted a notice of derogation suspending the extraterritorial application of the Covenant during periods of armed conflict or military occupation.").

derogation remains an option for resolving the conflicts discussed here.

A. THE RIGHT TO LIFE

One of the clearest areas of conflict between the two bodies of law involves the right to life. Humanitarian law permits state agents to intentionally kill combatants and incidentally kill civilians (within clearly proscribed limits) in circumstances that human rights law does not countenance.¹⁶³ Some of the conflicts between these legal frameworks can be resolved by reading ambiguous terms in human rights instruments to incorporate standards from humanitarian law during armed conflict,¹⁶⁴ but at bottom the two bodies of law give fundamentally different answers to the question of when state agents can use lethal force.

The ICCPR provides: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."¹⁶⁵ The obligation is non-derogable.¹⁶⁶ The use of the word "arbitrarily" in this provision clearly implies that lethal force is permitted under some circumstances, but the text of the ICCPR itself provides little guidance on what those circumstances are.¹⁶⁷ An Expert Meeting on the Right to Life in Armed Conflicts and Situations of Occupation¹⁶⁸ described the basic human rights law framework

163. See discussion *supra* Part III.B.2.

164. See discussion *supra* Part II.C.3 (discussing the specificity model of conflict of laws).

165. ICCPR, *supra* note 25, art. 6.

166. *Id.* art. 4 (stating that the provisions of Article 6 are nonderogable).

167. See *generally id.* (lacking clear guidance as to what situations allow the use of lethal force in international conflicts).

168. The Expert Meeting was organized by the University Centre for International Humanitarian Law, Geneva, and included a dozen prominent legal practitioners and academics. The participants were:

- William Abresch, Director, Extra-Judicial Executions Program, Center for Human Rights and Global Justice, New York University School of Law;
- Yuri Boychenko, Head of Division for Human Rights and Humanitarian Affairs, Permanent Mission of the Russian Federation, Geneva;
- Knut Dörmann, Deputy Head of the Legal Division, ICRC, Geneva;
- Professor Louise Doswald-Beck, Director, University Centre for International Humanitarian Law, Graduate Institute of International Studies, Geneva;
- Frederico Andreu Guzman, Senior Legal Advisor, International Commission of Jurists, Geneva;
- Professor Françoise J. Hampson, University of Essex, Member of the

for the use of lethal force as “the law enforcement model,” which has “two main features”:

First, the use of potentially lethal force is restricted to a narrow range of circumstances. Likewise, the use of potentially lethal force must be proportionate; it must be limited to addressing the threat which is posed. The other main feature of the law enforcement model is that, where possible, State officials must arrest rather than kill persons who are posing a threat. Likewise, States must plan their operations so as to maximize the chances of being able to effect an arrest.¹⁶⁹

In other words, under human rights law, the use of lethal force is only permitted in situations in which it is necessary to address a specific threat that cannot be neutralized through arrest.

Humanitarian law, on the other hand, allows far wider use of lethal force. As codified in the Geneva Conventions and in customary international law, humanitarian law permits state agents to target and kill enemy combatants who have not laid down their arms or been placed *hors de combat*. Humanitarian law also permits States to target civilians who are directly participating in hostilities for the duration of their participation in hostilities.¹⁷⁰ Enemy combatants do not have to pose a specific threat at the time they are targeted, nor do state agents have to attempt to arrest them before killing them. Moreover, humanitarian law permits state agents to kill noncombatant civilians in the course of attacking enemy combatants as long as the attack is aimed at a concrete and direct military objective and the resulting harm to civilians is necessary and proportionate to that objective.¹⁷¹ In other words, humanitarian law allows the use of lethal force subject to the principles of: (1) distinction

U.N. Sub-Commission on Human Rights, Governor of the British Institute of Human Rights;

- Professor Wolff Heintschel von Heinegg, Europa Universität Viadrina, Frankfurt (Oder);
- Professor David Kretzmer, The Hebrew University of Jerusalem;
- Colonel Philip McEvoy, Legal Advisor, Army Legal Services, United Kingdom;
- Jelena Pejic, Legal Advisor, ICRC Legal Division, Geneva;
- Steven Solomon, Principal Legal Officer, World Health Organization, Geneva, former Deputy Legal Advisor, U.S. Mission, Geneva; and
- Wilder Tayler, Legal Director, Human Rights Watch.

EXPERT MEETING ON THE RIGHT TO LIFE IN ARMED CONFLICT AND SITUATIONS OF OCCUPATION, UNIVERSITY CENTRE FOR INTERNATIONAL HUMANITARIAN LAW, GENEVA, SWITZ. 43 (2005), available at http://www.adh-geneva.ch/docs/expert-meetings/2005/3rapport_droit_vie.pdf.

169. *Id.* at 8.

170. See AP I, *supra* note 21, art. 51(3).

171. See *id.* arts. 51(5)(b), 57.

(the parties to the conflict must distinguish between civilians and civilian objects and military objectives); (2) military necessity (attacks must aim to achieve a concrete and direct military advantage); and (3) proportionality (incidental loss of civilian life, injury to civilians, and damage to civilian objects must be proportional to the concrete and direct military advantage anticipated).¹⁷²

The core tensions between the two bodies of law around the right to life thus concern the type of threat a person must pose before he or she can be targeted, whether the State has a duty to attempt to arrest a person before resorting to lethal force, and the degree to which the attack can incidentally harm non-combatant civilians. The three models described in Part II of this Article—displacement, complementarity, and conflict resolution—provide different approaches to resolving these tensions.

The Displacement Model asks simply whether the relevant conduct is part of an armed conflict or not. If it is armed conflict, then humanitarian law applies, and if not, then the human rights “law enforcement model” applies. The ICJ’s *Nuclear Weapons* Advisory Opinion can be read to follow this approach, as it explains that “whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life . . . can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the [ICCPR] itself.”¹⁷³

The Complementarity Model, on the other hand, would deny that there is any irresolvable conflict between the two bodies of law. The ICJ’s *Nuclear Weapons* Advisory Opinion can alternatively be read to follow this approach, as it asserts that the ICCPR applies during armed conflict, but that during armed conflict “[t]he test of what is an arbitrary deprivation of life [under the ICCPR] . . . falls to be determined by the applicable *lex specialis*,” namely, humanitarian law.¹⁷⁴ Under this approach, as one commentator put it, “humanitarian law is to be

172. See Henckaerts & Doswald-Beck, *supra* note 21, at 3–36, 46–50; W. Michael Reisman & Douglas L. Stevick, *The Applicability of International Law Standards to United Nations Economic Sanctions Programmes*, 9 EUR. J. INT’L L. 86, 94–95 (1998).

173. Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, ¶ 25 (July 8) (Advisory Opinion). As explained in Parts III.A & III.C, we believe that the ICJ’s *Nuclear Weapons* Advisory Opinion is probably characterized as adopting a pure displacement or event-specific displacement approach. See *supra* notes 32–35, 64–70 and accompanying text.

174. *Nuclear Weapons*, 1996 I.C.J. ¶ 25.

used to interpret a human rights rule, and, conversely in the context of the conduct of hostilities, human rights law may not be interpreted differently from humanitarian law.”¹⁷⁵ Thus, because the right to life is articulated in the ICCPR using an ambiguous term—“arbitrarily”—the displacement and complementarity models can reach the same answer.¹⁷⁶ But they reach that answer in different ways: the Displacement Model applies humanitarian law directly, whereas the Complementarity Model applies it indirectly by interpreting the ICCPR term “arbitrarily” to be defined by humanitarian law during armed conflict.

The Conflict Resolution Model would approach the problem differently, giving effect to both legal frameworks whenever possible and choosing one to the exclusion of the other in cases of conflict. The Israeli Supreme Court, for example, in its opinion in the *Targeted Killings Case* employed an approach akin to the event-specific displacement version of the Conflict Resolution Model, applying humanitarian law in all cases of conflict. When considering whether a State must attempt to arrest a civilian who is directly participating in hostilities before using lethal force against him, the High Court found a gap in the applicable humanitarian law and filled in that gap by requiring the State to abide by the human rights law duty to attempt arrest.¹⁷⁷ However, in cases where arrest is impracticable, the High Court found that humanitarian law applied, permitting the State to engage in targeted killing of civilians directly participating in hostilities as long as the attacks do not disproportionately harm other civilians.¹⁷⁸

The Inter-American Commission has followed an approach that tracks the specificity version of the Conflict Resolution Model—our favored approach. In *Abella*, the Inter-American Commission applied humanitarian law to Argentina’s killing of

175. Ray Murphy, *United Nations Military Operations and International Humanitarian Law: What Rules Apply to Peacekeepers?*, 14 CRIM. L.F. 153, 158 (2003).

176. See Dannenbaum Memo, *supra* note 30, at 7 (explaining that in the context of the right to life, the displacement and complementarity models can converge).

177. HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov’t of Israel [2006] (2) PD 459, ¶ 40 (Isr.), available at <http://www.icrc.org/ihl-nat.nsf/WebALL?openview> (follow “Israel” hyperlink; then follow “National Case Law” hyperlink; then follow “The Public Committee against Torture in Israel et al. v. The Government of Israel et al., Supreme Court of Israel, 14 December 2006” hyperlink).

178. *Id.*

participants in an armed attack on an army barracks,¹⁷⁹ but it applied human rights law to Colombia's killing of members of "marginal groups" engaged in mere "criminal activities."¹⁸⁰ The Commission's analysis in *Abella* covers nearly all of the five factors we propose for the specificity rule of Conflict Resolution. Regarding the *wording and content of the norms*, the Commission observed that applicable human rights instruments were not "designed to regulate such situations and, thus, they contain no rules governing the means and methods of warfare."¹⁸¹ In contrast, applicable rules of "humanitarian law generally afford victims of armed conflicts greater or *more specific* protections than do the more generally phrased guarantees in the American Convention and other human rights instruments."¹⁸² Nevertheless, the Commission went on to emphasize the importance of human rights law in the context of "internal armed conflict,"¹⁸³ suggesting that standards change when governments exercise greater *effective control*. Also relevant to the analysis was which body of law created a "higher standard" for the applicable right or freedom.¹⁸⁴ Although not identical to the permission/obligation approach we recommend, this inquiry demonstrates similar policy considerations. Finally, with respect to factors four and five, the Commission considered commentaries, international legal precedent, and the practice of OAS member states.¹⁸⁵ This more nuanced approach to the right to life ensures that human rights norms are applied without losing their substantive force, but at the same time appropriately tailors the legal rules to the armed conflict context in which they are applied.

B. DETENTION AND THE RIGHT TO TRIAL

A second important area of conflict between human rights law and humanitarian law concerns detention and the right to trial. There are several interlocking conflicts between these two bodies of law in this area. Most importantly, humanitarian law permits States to intern POWs for the duration of hostilities

179. *Abella v. Argentina*, Case 11.137, Inter-Am. Comm'n H.R., Report No. 55/97, OEA/Ser.L/V/II.95, doc. 7 rev. ¶ 156 (1997).

180. Colombia Report, *supra* note 109, ¶¶ 208, 213.

181. *Abella*, ¶ 158.

182. *Id.* ¶ 159 (emphasis added).

183. *Id.* ¶ 160.

184. *Id.* ¶¶ 164–65.

185. *See id.* ¶¶ 160, 162, 166.

and prohibits States from trying them for lawful combat activities,¹⁸⁶ while human rights law requires all individuals deprived of their liberty to be brought to trial,¹⁸⁷ with only limited exceptions. Humanitarian law also permits States to intern certain civilians without trial for security reasons,¹⁸⁸ which human rights law would prohibit. In addition, humanitarian law allows certain detention-related disputes to be adjudicated by administrative tribunals,¹⁸⁹ while human rights law requires a judicial hearing.¹⁹⁰ Finally, human rights law guarantees defendants the right to court-appointed counsel,¹⁹¹ while humanitarian law does not.¹⁹²

Turning first to human rights law, human rights instruments provide all individuals detained by the State with robust rights to judicial review. Article 9 of the ICCPR provides that “[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.”¹⁹³ In general, the “proceedings before a court” must take the form of a criminal trial, although detention without trial is permissible for narrow reasons pending trial, for reasons related to the detainee’s physical or mental health, and for reasons related to controlling immigration.¹⁹⁴ Where the proceedings take the form of a criminal trial, accused individuals have the right to a public hearing before an impartial tribunal, the right to be informed of charges against them,¹⁹⁵ the right to defend

186. See GC III, *supra* note 13, art. 21; Henckhaerts & Doswald-Beck, *supra* note 21, at 384.

187. AP I, *supra* note 21, art. 75(4).

188. See Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 42, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV].

189. See GC III, *supra* note 13, art. 96.

190. Henckhaerts & Doswald-Beck, *supra* note 21, at 355.

191. ICCPR, *supra* note 25, art. 9.

192. See GC III, *supra* note 13, art. 72 (stating that the “Protecting Power may provide” defendants court-appointed counsel, suggesting that there is discretion within the Protecting Power).

193. ICCPR, *supra* note 25, art. 9.

194. See Inter-Am. Comm’n on Human Rights, Report on Terrorism and Human Rights, ¶¶ 118, 124, OEA/Ser.L/V/II.116, doc. 5 rev. 1 corr (Oct. 22, 2002) (interpreting nearly identical provisions of the American Declaration on Human Rights and the American Convention on Human Rights and noting the similarity to the provisions of the ICCPR).

195. ICCPR, *supra* note 25, art. 14(3)(a).

themselves,¹⁹⁶ the right to an interpreter,¹⁹⁷ the right to cross-examine witnesses,¹⁹⁸ the right to be presumed innocent until proven guilty,¹⁹⁹ and the right to appeal.²⁰⁰ When hearings cannot be public for reasons of public order, morals, or national security, judgments must be made public, with some narrow exceptions.²⁰¹ Accused individuals also have the right "[t]o have adequate time and facilities for the preparation of [their] defence and to communicate with counsel of [their] own choosing,"²⁰² and they must be appointed a defender if they cannot afford one.²⁰³ They also must be "tried without undue delay."²⁰⁴ Detention under human rights law is thus focused on criminal law enforcement, with limited exceptions for public safety and immigration.

States' authority to detain under humanitarian law is generally broader than under human rights law, although the scope of that authority depends on whether the detainee is a POW or a civilian. When members of the enemy's armed forces are captured, humanitarian law permits the State to intern²⁰⁵ them as POWs without trial for the duration of hostilities.²⁰⁶ However, POWs need only give their name, rank, serial number, and date of birth in response to any questioning,²⁰⁷ and

196. *Id.* art. 14(3)(d).

197. *Id.* art. 14(3)(f).

198. *Id.* art. 14(3)(e).

199. *Id.* art. 14(2).

200. *Id.* art. 14(5).

201. *Id.* art. 14(1).

202. *Id.* art. 14(3)(b).

203. *Id.* art. 14(3)(d).

204. *Id.* art. 14(3)(c).

205. Internment is a form of deprivation of liberty distinct from and less harsh than detention. The ICRC's commentary to the Third Geneva Convention explains that

[t]o intern a person is to put him in a certain area or place—in the case of prisoners of war, usually a camp—and to forbid him to leave its limits. The concept of internment should not be confused with that of detention. Internment involves the obligation not to leave the town, village, or piece of land, whether or not fenced in, on which the camp installations are situated, but it does not necessarily mean that a prisoner of war may be confined to a cell or a room. Such confinement may only be imposed in execution of penal or disciplinary sanctions

ICRC, COMMENTARY ON THE THIRD GENEVA CONVENTION RELATIVE TO THE TREATMENT OF THE PRISONERS OF WAR 178 (Jean S. Pictet ed., 1960).

206. GC III, *supra* note 13, art. 21.

207. *Id.* art. 17.

they must be released at the end of hostilities.²⁰⁸ POWs also enjoy immunity for lawful combat activities, and therefore may not be tried for murder or similar civil crimes.²⁰⁹ POWs may be punitively detained during or after hostilities only upon conviction for a war crime or for a crime committed during internment, and States must provide accused POWs with the basic guarantees of due process.²¹⁰ Where an individual's combatant status is unclear, a competent tribunal (not necessarily a court) must determine whether the individual qualifies as a POW.²¹¹ Civilians, on the other hand, have rights against detention under humanitarian law that are simultaneously narrower and broader than those of POWs. States may intern aliens within their territory and civilians residing in occupied territory only where "security . . . makes it absolutely necessary"²¹² or for "imperative reasons of security."²¹³ However, unlike POWs, interned civilians are entitled to have the substantive basis for their internment reviewed by a competent tribunal (again, not necessarily a civilian court).²¹⁴ For civilians residing in occupied territory, the penal code of the occupied State presumptively remains in place, but the occupying State may supplement that code with its own penal laws on a prospective basis.²¹⁵ Unlike lawful combatants, civilians enjoy no immunity from ordinary penal laws, and therefore may be tried and incarcerated for murder or other crimes to the extent that they participate in hostilities, subject to basic procedural guarantees. Those procedural guarantees, however, do not include the right to appointed counsel,²¹⁶ and the tribunal hearing the case may be a military rather than a civilian court.²¹⁷

The central conflicts between the two bodies of law surrounding detention thus concern States' ability to intern POWs and civilians without trial, the extent to which detention or internment must be subject to review by a court, and whether ci-

208. *Id.* art. 133.

209. *See id.* art. 70.

210. AP I, *supra* note 21, art. 75(4)(d); AP II, *supra* note 21, art. 6(2); GC III, *supra* note 13, arts. 95–96, 99, 103–07.

211. GC III, *supra* note 13, art. 5.

212. GC IV, *supra* note 188, art. 42.

213. *Id.* art. 78.

214. *Id.* arts. 43, 78.

215. *Id.* arts. 64–67.

216. *See id.* arts. 71–74.

217. *Id.* art. 66.

vilians in an occupied territory are entitled to appointed counsel if tried for a crime.

The Displacement Model would resolve these conflicts by asking simply whether or not there is an armed conflict. If an armed conflict is present, then POWs and civilians may be interned without trial, POWs may not be tried for their lawful combat activities, disputes around combatant status and the basis for civilian internment may be adjudicated by administrative or military tribunals, and civilians in occupied territory need not be provided with appointed counsel. If no armed conflict is present, then all detainees must be brought to trial before a court (subject to the exceptions for public safety and immigration), there is no immunity for combat activities, and criminal defendants must be afforded appointed counsel.

The Complementarity Model would proceed by attempting to reconcile the requirements of the two bodies of law. With regard to appointed counsel, since humanitarian law does not expressly provide that occupying States have no obligation to provide appointed counsel, this model would be expected to resolve that conflict by requiring the appointment of counsel. Similarly, no provision of humanitarian law would be violated by having combatant status disputes and civilian internee cases heard by a judicial instead of an administrative tribunal, as human rights law would require.²¹⁸ The Complementarity Model, however, cannot effectively address the truly irreconcilable conflict over whether or not States must bring all detained individuals to trial. Humanitarian law provides that POWs can-

218. The Inter-American Commission suggested its support for this approach in the executive summary to its Report on Terrorism and Human Rights:

Notwithstanding the existence of these specific rules and mechanisms governing the detention of persons in situations of armed conflict, there may be circumstances in which the supervising mechanisms under international humanitarian law are not properly engaged or available, or where the detention or internment of civilians or combatants continue [sic] for a prolonged period. Where this occurs, the regulations and procedures under international humanitarian law may prove inadequate to properly safeguard the minimum standards of treatment of detainees, and the supervisory mechanisms under international human rights law, including *habeas corpus* and *amparo* remedies, may necessarily supercede international humanitarian law in order to ensure at all times effective protection of the fundamental rights of detainees.

Report on Terrorism and Human Rights Executive Summary, *supra* note 194, ¶ 14.

not be brought to trial,²¹⁹ but human rights law provides that they must;²²⁰ humanitarian law provides that civilians may be interned for security reasons,²²¹ but human rights law provides that they may not.²²² These rules cannot be easily harmonized.

The Conflict Resolution Model would take the same approach as the Complementarity Model in cases where human rights law and humanitarian law are in a relationship of interpretation, and would then resolve cases of true conflict according to the chosen rule of conflict resolution. Accordingly, the Conflict Resolution Model would, like the Complementarity Model, provide appointed counsel and would adjudicate all disputes over the basis for detention before judicial rather than administrative tribunals. As for internment of POWs and civilians without trial, the event-specific displacement version of the Conflict Resolution Model would apply humanitarian law and allow internment without trial. The reverse event-specific displacement model—which some tribunals have followed for jurisdictional reasons—would instead apply human rights law and demand that all detainees be brought to trial. Finally, the specificity version of the Conflict Resolution Model would almost certainly turn to humanitarian law as the more specific law governing captured enemy combatants, based on an assessment of the wording and content of the norms, the nature of the norms in question, the level of control exercised by the State, expressions of intent by parties to relevant treaties, and state practice. After all, humanitarian law has numerous detailed provisions on the internment of POWs that both expand and restrain state power relative to the peacetime baseline, and the history of state practice applying these rules is sufficiently robust to render them binding as customary international law.²²³ Detention thus provides the clearest demonstration of the importance of contextual assessment of human rights and humanitarian law, which only the specificity rule version of the Conflict Resolution Model permits.

219. ICRC, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 21, at 384.

220. See ICCPR, *supra* note 25, art. 9(3).

221. GC IV, *supra* note 188, art. 42.

222. See ICCPR, *supra* note 25, art. 9.

223. See ICRC, *supra* note 21, at 344–52.

C. WOMEN'S RIGHTS

A third potential area of conflict between the two bodies of law concerns women's rights. The leading human rights convention on women's rights, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), obligates state parties (which do not presently include the United States) to "take all appropriate measures" to eliminate discrimination and guarantee legal, social, and economic equality to women.²²⁴ Humanitarian law, however, focuses more narrowly on protecting women from sexual assault and protecting them in their role as mothers. While the protections under the two bodies of law are largely compatible, conflicts may arise during armed conflict due to an occupying State's obligation under humanitarian law to preserve local law and States' diminished capacity to guarantee the degree of social equality envisioned by human rights law in the context of war.

Human rights law broadly provides for non-discrimination and equality for women in all fields of society. CEDAW requires States to "accord to women equality with men before the law,"²²⁵ and to "take all appropriate measures" to eliminate discrimination and ensure equal rights to vote, to participate in government, to participate in public associations and organizations,²²⁶ to education,²²⁷ to healthcare,²²⁸ to employment and economic opportunity,²²⁹ and to the benefits and burdens of marriage.²³⁰ CEDAW does not explicitly prohibit violence against women, but States may have an obligation to prevent violence against women as a matter of customary human rights law.²³¹ While CEDAW has no derogation provision, the rights therein are generally articulated at a relatively high level of abstraction—for example, Article 12 provides that "State Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services."²³²

224. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].

225. *Id.* art. 15.

226. *Id.* arts. 7–8.

227. *Id.* art. 10.

228. *Id.* art. 12.

229. *Id.* arts. 11, 13–14.

230. *Id.* art. 16.

231. See BONITA MEYERSFELD, DOMESTIC VIOLENCE AND INTERNATIONAL LAW 6 (2010).

232. CEDAW, *supra* note 224, art. 12.

Moreover, the language of “tak[ing] all appropriate measures” suggests that States have some leeway in exactly how they implement their obligations.²³³

Under humanitarian law, women enjoy the same protections that apply to all persons during armed conflict, but there are also a number of provisions that protect women exclusively.²³⁴ Under the Geneva Conventions, women must “be treated with all consideration due to their sex.”²³⁵ This entails a right against discrimination—under the Third Geneva Convention, for example, female prisoners of war must “in all cases benefit by treatment as favourable as that granted to men”²³⁶ and may not be sentenced to a more severe punishment than male members of the detaining armed forces in similar circumstances.²³⁷ Beyond non-discrimination, humanitarian law also has provisions giving women special protection due to their reproductive roles and vulnerability to sexual assault.²³⁸ Numerous articles in the Fourth Geneva Convention and Additional Protocol I expressly single out mothers and pregnant women for special consideration and protection.²³⁹ The Fourth Geneva Convention and Additional Protocol I also provide that women must be protected from sexual violence, including rape, assault, and forced prostitution.²⁴⁰ Female POWs also are given special consideration regarding privacy: they may not be housed with or searched by men.²⁴¹ In addition, even beyond the Geneva Conventions, the U.N. Security Council recently has adopted a series of resolutions aimed at protecting women from gender-

233. *Id.*

234. See ICRC, ANNEX TO THE GUIDANCE DOCUMENT: GENERAL AND SPECIFIC PROTECTION OF WOMEN UNDER INTERNATIONAL HUMANITARIAN LAW (2004), available at <http://www.unhcr.org/refworld/category,LEGAL,ICRC,,,46e94378d,0.html> (discussing provisions protecting women throughout various issues).

235. Geneva Convention for the Amelioration of the Condition of the Wounded and the Sick in Armed Forces in the Field art. 12(4), Aug. 12, 1949, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, art. 12(4), 75 U.N.T.S. 85.

236. GC III, *supra* note 13, art. 14.

237. *Id.* art. 88(3).

238. See Judith G. Gardam, *Women, Human Rights and International Humanitarian Law*, 324 INT’L REV. RED CROSS 421, 421–22 (1998).

239. AP I, *supra* note 21, arts. 8(a), 70(1), 76; GC IV, *supra* note 188, arts. 14, 16, 23, 50, 91.

240. AP I, *supra* note 21, art. 76; GC IV, *supra* note 188, art. 27.

241. AP I, *supra* note 21, art. 75(5); AP II, *supra* note 21, art. 5(2)(a); GC III, *supra* note 13, arts. 25, 29, 97; GC IV, *supra* note 188, arts. 76, 85, 97, 124.

based violence during armed conflict and at providing women a role in conflict-resolution and peace-making.²⁴² At the same time, however, the Fourth Geneva Convention establishes that occupying States have an obligation to preserve the penal law of the occupied State and to allow local tribunals to continue to operate.²⁴³

The differences between the two bodies of law regarding women's rights thus center around (1) the broader scope of protection that human rights law provides compared to humanitarian law, (2) occupying States' obligation under humanitarian law to preserve local law and local courts even if they discriminate against women in contravention of human rights law, and (3) States' diminished capacity to guarantee the kind of social equality envisioned by human rights law during armed conflict.

The Displacement Model would resolve each of these conflicts in favor of humanitarian law in all cases during armed conflict. While in an armed conflict situation, the broader protections of human rights law would not apply, even when they are not incompatible with the narrower protections afforded by humanitarian law. Similarly, occupying States' obligation to preserve local law and local courts would supersede any human rights law duty of nondiscrimination, and any diminished State capacity to guarantee equality would be moot, since there would be no human rights law obligation to take appropriate measures to ensure social equality.

The Complementarity Model would attempt to harmonize a State's obligations under the two bodies of law. Because the broader protections afforded by human rights law are not incompatible with humanitarian law's narrower and more specific protections, this approach would apply both sets of obligations. As for occupying States' duty to protect local law and local courts, the complementarity approach might proceed by noting that CEDAW only obligates States to "take all appropriate measures" to guarantee equality;²⁴⁴ accordingly, measures that would violate the Geneva Conventions could be considered not to be "appropriate," and therefore not mandatory under CEDAW. The complementarity approach might also exploit the leeway implicit in the word "appropriate" in addressing States'

242. See S.C. Res. 1888, ¶¶ 3, 18, 26, U.N. Doc. S/RES/1888 (Sept. 30, 2009); S.C. Res. 1820, ¶¶ 3, 12, U.N. Doc. S/RES/1820 (June 19, 2008); S.C. Res. 1325, ¶¶ 2, 10, U.N. Doc. S/RES/1325 (Oct. 31, 2000).

243. GC IV, *supra* note 188, art. 64.

244. CEDAW, *supra* note 224.

diminished capacity in wartime, concluding that CEDAW only requires States to eliminate discrimination against women to the extent that they have the effective capacity to do so.

Such an approach, in which the two bodies of law are taken to be reconcilable, would align with developments in the two bodies of law over the past two decades. Humanitarian law has come to encompass more protections for women's rights, and human rights law has begun to acknowledge the risk that women face from gender-based violence both in and out of conflict settings.²⁴⁵ The Vienna Declaration adopted by the U.N. World Conference on Human Rights recognized the fundamental convergence between these two bodies of law, declaring that "violations of the human rights of women in situations of armed conflict are violations of the fundamental principles of human rights and humanitarian law."²⁴⁶

The Conflict Resolution Model would reach the same ultimate conclusions as the Complementarity Model in this area of law. After all, the Conflict Resolution Model only requires resort to a rule of conflict resolution when there is a true conflict between the relevant human rights law and humanitarian law. In this case, human rights law and humanitarian law are in a relationship of interpretation, and thus it is possible to apply each without excluding the validity and applicability of the other. The overlap between the Complementarity and Conflict Resolution Models in the area of women's rights illustrates that, to the extent that human rights law and humanitarian law norms do not conflict, the Conflict Resolution Model operates precisely the same as the Complementarity Model.

D. THE RIGHTS TO FREEDOM OF EXPRESSION, ASSOCIATION, AND MOVEMENT

The rights to free expression, association, and movement provide a fourth area of potential conflict between human

245. The U.N. General Assembly adopted the Declaration on the Elimination of Violence Against Women in 1993 which "expressly recognized that women in situations of armed conflict are especially vulnerable to violence." Gardam, *supra* note 238, at 426. The U.N. has also appointed a Special Rapporteur on violence against women "with a mandate covering situations of armed conflict The Fourth U.N. World Conference on Women, held in Beijing in 1995, recognized the seriousness of armed conflict and its impact on the lives of women." *Id.* at 427.

246. *Id.* at 426 (quoting World Conference on Human Rights, June 14–25, 1993, *Vienna Declaration and Programme of Action* U.N. Doc. A/Conf. 157/24 (Part I) (Oct. 13, 1993)).

rights law and humanitarian law. While conflicts may arise, however, the human rights law and humanitarian law relating to these rights are largely reconcilable due to limitations on the scope of the rights under the ICCPR and due to the Fourth Geneva Convention's baseline concern for the fundamental rights of civilians residing in occupied territories.

The rights to free expression, association, and movement are all protected in the ICCPR. Article 19 guarantees "the right to hold opinions without interference" and "the right to freedom of expression";²⁴⁷ Article 21 guarantees "the right of peaceful assembly";²⁴⁸ and Article 12 guarantees "the right to liberty of movement and freedom to choose [one's] residence."²⁴⁹ These rights, however, are not absolute under the ICCPR. Each may be restricted in the interest of "national security, public order (*ordre public*), public health or morals or the rights and freedoms of others."²⁵⁰

Humanitarian law has a number of provisions that touch on the rights to free expression, association, and movement. Turning first to free expression, humanitarian law's definition of a "military objective"—"those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage"²⁵¹—is clearly broad enough to encompass media and communications infrastructure, rendering important means of expression legitimate targets of military attack. In addition, the Fourth Geneva Convention permits an occupying State to supplement local law with its own penal laws to the extent that they are "essential to enable the Occupying Power . . . to maintain the orderly government of the territory[] and to ensure the security of the Occupying Power"²⁵² This authority does not extend so far as to allow an occupying State to punish "opinions expressed before the occupation,"²⁵³ but that very limitation suggests that an occupying State may punish opinions expressed during the occupation.

247. ICCPR, *supra* note 25, art. 19(1)–(2).

248. *Id.* art. 21.

249. *Id.* art. 21(1).

250. *Id.* art. 12(3). Articles 19 and 21 contain nearly identical limitations, with only slight variations in phrasing. *Id.* arts. 19(3)(b), 21.

251. AP I, *supra* note 21, art. 52(2).

252. GC IV, *supra* note 188, art. 64.

253. *Id.* art. 70.

This same power to establish new laws also leaves room for an occupying State to restrict the right of free association and assembly. As for the right to freedom of movement, the commentary on Article 27 of the Fourth Geneva Convention explicitly recognizes that “the freedom of movement of civilians of enemy nationality may certainly be restricted, or even temporarily suppressed, if circumstances so require.”²⁵⁴ That same commentary notes, however, that “the regulations concerning occupation and those concerning civilian aliens in the territory of a Party to the conflict are based on the idea of the personal freedom of civilians remaining in general unimpaired.”²⁵⁵ Thus, to varying degrees, humanitarian law explicitly or implicitly permits States to restrict the rights of freedom of expression, association, and movement recognized by human rights law during armed conflict.

The Displacement Model would resolve these conflicts by allowing States to restrict those rights to the full extent allowed by humanitarian law, with human rights law completely displaced within the zone of armed conflict.

The Complementarity Model would likely proceed by noting that each of these rights is limited in human rights law itself by considerations of national security and public order, considerations that are unquestionably triggered during armed conflict. Similarly, the commentary to Article 27 of the Fourth Geneva Convention demonstrates that while humanitarian law permits these rights to be restricted, it starts from the baseline proposition that they should be honored where possible.²⁵⁶ In this way, the two bodies of law can be interpreted so that their respective norms are compatible and mutually reinforcing.

As with women’s rights, the Conflict Resolution Model would follow the same approach as the Complementarity Model in this area of law. The relevant norms are in a relationship of interpretation rather than a relationship of conflict, therefore the Conflict Resolution Model need not employ a rule of conflict resolution here.

Together, these four examples demonstrate how the various models outlined in Part II operate when human rights law and humanitarian law have different or conflicting norms. In each case, the Displacement Model offers a straightforward but

254. ICRC, COMMENTARY, IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIANS IN TIMES OF WAR 202 (Jean S. Pictet ed., 1958).

255. *Id.*

256. GC IV, *supra* note 188, art. 21.

unnuanced solution—one that always requires human rights law to defer to humanitarian law, even in cases where human rights law is better tailored to the situation or where human rights law might productively inform humanitarian law. The Complementarity Model, by contrast, gives full effect to both bodies of law. But it is incapable of addressing irreconcilable conflicts between the two bodies of law—particularly regarding the right to life and detention and right to trial—and thus offers an incomplete solution. The Conflict Resolution Model—in particular the version that employs the specificity test to resolve conflicts—has the strengths of the Complementarity Model without its weaknesses. It gives full effect to both bodies of law, using both to inform one another wherever possible. But it offers a tool for resolving direct conflicts between the two bodies of law—guiding decision makers to turn to the body of law most specific to the particular event at hand, a determination informed by five key factors.

CONCLUSION

In the period following the attacks of September 11, 2001, the United States, United Kingdom, and other States committed increasing numbers of troops abroad in an effort to eliminate the threat of terrorist attacks by al Qaeda and its affiliates. With that war now in its second decade, a host of new legal questions has emerged. Key among them is what law these States should turn to in determining the legality of their conduct. Does human rights law impose obligations on the actions of States outside their own territory? If so, what happens when those obligations conflict with the legal rules as defined by humanitarian law? Must prisoners of war be tried (as required for detainees under human rights law) or may they only be held to the end of hostilities (as required under humanitarian law)? Is a State obligated to attempt to arrest a civilian directly participating in hostilities or may the State use lethal force against him without first attempting arrest? The answer to these questions depends on which body of law—human rights law or humanitarian law—applies.

This Article has outlined three separate models for answering this question. Under the Displacement Model, humanitarian law displaces human rights law entirely in the zone of armed conflict; under the Complementarity Model, the two bodies of law both apply in armed conflict and are interpreted harmoniously; and under the Conflict Resolution Model, the

two bodies of law may both apply in armed conflict but when that is not possible, there are three possible decision rules for choosing between the two bodies of law. Of the three possible rules, we argue for the specificity rule, in which the choice between applying human rights law or humanitarian law depends on which is deemed most specific to the given situation. This approach allows for highly nuanced determinations as to whether particular conduct in the context of armed conflict may be governed best by human rights law or humanitarian law when the two conflict, while also recognizing—as the Complementarity Model does—that both bodies of law may productively inform each other in the many situations in which they do not conflict. The approach is also consistent with the jurisprudence of a range of international tribunals and the positions of U.S. allies.

This approach recognizes that humanitarian law is often—but not always—the body of law most specifically tailored to armed conflict situations. Merely because a given situation occurs within an armed conflict zone does not necessarily preclude the application of human rights law. Indeed, human rights law offers an alternative toolset that may be better tailored to a given situation. At the same time, this approach does not pretend that all conflicts between the two bodies of law can be resolved through a process of interpretation. Some conflicts are irreconcilable, and it is necessary to have an effective tool for resolving those conflicts.

Humanitarian law and human rights law regulate similar conduct and are both rooted in an effort to safeguard human dignity. Jakob Kellenberger, President of the International Committee of the Red Cross once wrote, “[l]ike international human rights, international humanitarian law aims, among other things, to protect human life, prevent and punish torture and ensure fundamental judicial guarantees to persons subject to criminal process.”²⁵⁷ The specificity-based Conflict Resolution Model, which gives maximum effect to both bodies of law where possible but offers a balanced approach for choosing between them when necessary, offers the most effective available legal tool for protecting that fundamental human dignity.

257. Kellenberger, *supra* note 42.